Supreme Court, U.S.
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No. 931389 FEB 28 1994

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

REFCO, INC.,

Petitioner,

– against –

THE COMMITTEE OF RECEIVERS FOR A.W. GALADARI, and THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Second Circuit's interpretation of the third clause of the commercial activity exception to foreign sovereign immunity, under 28 U.S.C. § 1605(a)(2), conflicts with the plain meaning of § 1605(a)(2), which provides that a foreign state is not immune from suit based upon an offensive *act* outside the United States that is effected "*in connection with a commercial activity* elsewhere" and "*that act* causes a direct effect in the United States," yet the Second Circuit held that it is insufficient for the injurious *act* to be *in connection with* a commercial activity and that, to fall within the exception, the offensive *act* itself must be *commercial activity* and the *commercial activity* must cause a direct effect in the U.S.

2. Whether the Second Circuit erroneously interpreted the waiver exception to foreign sovereign immunity under 28 U.S.C. § 1605(a)(1), which provides that a foreign state shall not be immune from jurisdiction in any case in which it has waived its immunity "either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect ...," to require a showing that the foreign state subjectively intended to waive immunity, even where its objective conduct demonstrates an implicit waiver.

PARTIES TO THE PROCEEDING

The caption of the case in this Court does not contain the names of all parties. The parties in the circuit court included The Drexel Burnham Lambert Group Inc. ("Drexel"), which is simultaneously filing a separate petition for a writ of certiorari to review the same decision of the Second Circuit. The parties in the district court included defendants A.W. Galadari ("Galadari") and A.W. Galadari Commodities ("Commodities"), who have answered the amended and supplemental complaint, and defendant A.W. Galadari Holdings (Private) Ltd. ("Holdings"), which has not appeared.

Petitioner Refco, Inc. has no subsidiary companies, and its parent is Refco Group, Ltd.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Refco, Inc. ("Refco") respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit, entered on November 29, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (App. 1a-30a) is reported at 12 F.3d 317 (2d Cir. 1993). The opinion of the United States District Court for the Southern District of New York (App. 33a-72a) is reported at 810 F. Supp. 1375 (S.D.N.Y. 1993).

JURISDICTION

The circuit court entered its decision on November 29, 1993. The decision of the circuit court reversed the order of the district court, which, *inter alia*, denied respondents' motions to dismiss the amended and supplemental complaints of Refco and Drexel, and held that it had subject matter jurisdiction over the claims against respondents the Emirate of Dubai, United Arab Emirates (the "Emirate") and the Committee of Receivers (the "Committee") under the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.* (1976) ("FSIA"). Jurisdiction in the court of appeals rested upon the "collateral order doctrine." App. 13a (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949)).

The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

The FSIA, 28 U.S.C. §§ 1602-1611, provides in relevant part as follows:

§ 1603. Definitions.

For purposes of this chapter --

* * * *

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

§ 1604. Immunity of foreign state from jurisdiction.

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune

from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

§ 1605. General exception to the jurisdictional immunity of a foreign state.

(a) A foreign state shall not be immune from th jurisdiction of courts of the United States or of the States in any case --

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

STATEMENT OF THE CASE

This action arises from Refco's attempt to recover the debts of Galadari and his company Commodities. The debts arose in 1983 from commodities trading. Respondents, the Emirate and the Committee, are alleged to be the successors to Galadari and his businesses as a result of their takeover, management and/or liquidation of Galadari's businesses in the Emirate of Dubai. A majority of the Second Circuit panel dismissed the amended and supplemental complaints of Refco and Drexel as a result of an erroneous construction of the third clause of the commercial activity exception to foreign sovereign immunity under § 1605(a)(2), as well as the waiver exception under § 1605(a)(1).

In analyzing the commercial activity exception, the Second Circuit majority agreed with the district court that respondents' activities in taking over, managing and liquidating Galadari's assets might be regarded as commercial activities. App. 24a. The facts as found by the district court make clear that the acts which form the bases of petitioners' claims -- the repudiation of the debts -- relate directly to the Emirate's and the Committee's acknowledged commercial conduct -- marshalling, operating and, in some cases, liquidating Galadari's assets and businesses. The appellate court's majority held, however, that these commercial activities "are not activities that 'cause[d] a direct effect in the United States,' § 1605(a)(2), upon which the claims of Drexel and Refco are based." *Id.* The majority found that the "gravamen" of petitioners' claims concerns the "judicial role of the Committee in marshalling the assets of Galadari and Commodities and adjudicating the claims of their creditors ... and not any of the tangentially related commercial conduct in which the Committee or the Emirate might have engaged." App. 24-25a. In reaching its conclusion, the majority expressly rejected petitioners' showing that the plain language of the third clause of § 1605(a)(2) "requires only that the foreign act that causes a direct effect in the United States occur 'in connection with' a commercial activity." App. 25a. The majority stated that it does not read the Supreme Court's ruling in *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993) and *Republic of Argentina v. Weltover*, 112 S. Ct. 2160 (1992) to support petitioners' construction of § 1605(a)(2). App. 26a.

As shown below, this Court should grant certiorari to review the Second Circuit's decision because it improperly rewrites the plain language of the statute in effect requiring that the claim be based, not upon an act "in connection with" commercial activity, but upon a commercial activity itself. This Court should grant certiorari also to review the Second Circuit decision with respect to the commercial activity exception for the further reason that the decision conflicts with decisions of the Third, Ninth and Eleventh Circuits, which have interpreted § 1605(a)(2).

The Second Circuit's interpretation of the waiver exception to foreign sovereign immunity -- § 1605(a)(1) -- also conflicts

with the statute's plain meaning. The Second Circuit did not dispute the district court's finding that the Committee appeared generally in the Drexel action and asserted 25 affirmative defenses without asserting foreign sovereign immunity and that the Committee appeared in the Refco action and opposed Refco's motion for an order of attachment without raising the issue of sovereign immunity. App. 15-16a. Nevertheless, the Second Circuit held that the Committee's conduct did not constitute an implicit waiver of immunity because the Committee subsequently stated in the Drexel action that it might in the future assert an immunity defense and later asserted the defense in the Refco state court action, as well as in motions to dismiss the amended and supplemental complaints in the district court. The Second Circuit found that the Committee, therefore, had not impliedly intended to waive immunity. The Second Circuit's decision, which relies exclusively upon conduct which occurred long after the Committee elected to appear and participate in litigation without asserting an FSIA defense, contravenes the plain language of § 1605(a)(1) which declares that a waiver occurs "either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect ..."

Galadari and his companies. In the early 1980's, Galadari owned and operated a number of businesses, including Holdings, which conducted extensive operations in and outside Dubai. Through Holdings, Galadari owned 46 percent of the Union Bank of the Middle East ("Union Bank"), now known as the Emirates International Bank, Ltd. Galadari traded commodities, both for his own account and on behalf of customers. Galadari and Commodities conducted commodities trading during 1982 and 1983 through accounts with Refco and Drexel. Galadari and Commodities lost tens of millions of dollars while trading on U.S. commodities exchanges through accounts with Refco and Drexel, which covered the losses. Refco holds a July 1983 letter agreement that acknowledges a debt of more than $6 million owed by Galadari and Commodities. Refco was paid $1.5 million of the debt and the undisputed remaining principal debt owed to Refco is more than $4.6 million. Drexel also is the holder of a note executed by Galadari, acknowledg-

ing commodities trading debts owed to Drexel, pursuant to which Drexel admittedly is owed over $12.4 million.

The Emirate and its creation of the Committee. In November 1983, the Emirate seized Galadari's assets, including Holdings and Commodities, and jailed Galadari. In a November 1983 decree, the Emirate appointed a provisional board to assume control of Galadari's assets and to operate the Union Bank. Drexel sought repayment from the provisional board of the note executed by Galadari. The provisional board chairman appointed by the Emirate told Drexel its claim represented "gambling losses" and, therefore, did not merit payment. App. 28a (Newman, C.J., dissenting), 57a n.19.

In April 1984, the Emirate took over ownership of the Union Bank by purchasing the Union Bank shares that had belonged to Holdings. *Drexel v. Galadari*, 777 F.2d 877, 879 (2d Cir. 1985). The Emirate also increased the capital of the bank by purchasing unissued shares and extending a substantial line of credit. The Emirate now owns 80 percent of the Union Bank.

As the district court found (App. 37-38a), and as the dissenting opinion of the circuit court noted (App. 28a), in an April 1984 decree, the Emirate appointed the Committee to serve in dual capacities with respect to Galadari and his business. On the one hand, the decree designated the Committee as the successor to the provisional board of the Union Bank and vested the Committee with the authority to take custody of and operate all of Galadari's non-banking assets. On the other hand, the decree vested the Committee with the authority to liquidate the assets and to determine and pay creditors' claims. Since 1984, the Committee has continued to operate some Galadari companies, including Holdings, and has liquidated others. The Emirate continues to own and operate the Union Bank, which is the largest single claimant to the Galadari assets, representing approximately 90 percent of the claims.

Refco and Drexel submitted their claims against Galadari and Commodities to the Committee in July 1984. *Drexel v. Galadari*, 127 B.R. 87, 90 (S.D.N.Y. 1991). Refco and Drexel contend that Holdings was responsible for the unpaid debts of

Commodities. Commodities was, like many other Galadari businesses, a division of Holdings, as evidenced by, *inter alia*, the 1982 audited accounts for Holdings which list Commodities as one of Holdings' wholly-owned unincorporated divisions. *Drexel v. Galadari*, 134 B.R. 719, 721-724 (S.D.N.Y. 1991).

The Refco action. In August 1984, Refco commenced an action against Galadari and Commodities in New York state court. The Committee voluntarily appeared and participated in the action as the real party in interest. The Committee opposed Refco's motion for an order of attachment, argued the merits of Refco's claims and sought affirmative relief from the court. In recognition of the Committee's party status, the state court added the Committee as a defendant in 1985. Thereafter, in a belated and ineffective attempt to retract its waiver of immunity, the Committee asserted a claim of immunity in a motion to dismiss that was subsequently withdrawn without prejudice.

In an action commenced by Drexel, the Committee appeared and litigated for over seven years without asserting sovereign immunity. After a hearing directed by the circuit court on whether the "unchartered territory" of the Dubai proceedings was entitled to comity deference, the district court, in January 1987, extended comity to the Dubai proceedings and the Drexel action was stayed. *Drexel v. Galadari*, No. 84 Civ. 2602 (CBM), 1987 U.S. Dist. LEXIS 5030 (S.D.N.Y. Jan. 29, 1987).

During 1985-1990, in consideration of the Committee's promises, that, if Refco agreed not to pursue its New York action, Refco's claim would be considered together with and the same as Drexel's, and Refco could rely on the Committee's dealings with Drexel as if the Committee were dealing directly with Refco, Refco agreed continuously to adjourn its action in favor of the Dubai proceedings. In January 1990, Refco refused to grant the Committee any further adjournments. *Drexel*, 127 B.R. at 90-94. After treating Refco together with and the same as Drexel for six years, the Committee removed Refco's action to the district court and had it consolidated with the Drexel action and stayed. *Refco, Inc. v. Galadari*, 755 F. Supp. 79, 84 (S.D.N.Y. 1991).

In 1991, the district court found that the Dubai proceedings were no longer entitled to comity deference because the Committee had denied petitioners due process by, among other things, fabricating issues against Drexel's and Refco's claims and orchestrating an expert opinion holding that Commodities was not a division of Holdings. The district court further held that these actions were taken as part of a campaign to repudiate Refco's and Drexel's claims. *Drexel*, 134 B.R. at 722-25; *Drexel*, 127 B.R. at 95-100. Thereafter, the Committee conceded the validity of Refco's and Drexel's claims as against Galadari and Commodities, but refused to pay the claims on the purported basis that Commodities was not a division of Holdings and neither Commodities nor Galadari had assets to pay the claims. In June 1991, the district court lifted the stays and allowed Refco and Drexel to pursue their claims in the district court upon the grounds that any appellate proceeding available to Refco and Drexel in Dubai also would be fundamentally unfair and Refco's counsel had been denied entry into Dubai because he was born in Israel. In January 1992, the district court granted Refco's and Drexel's motions to amend and supplement their complaints.

The District Court held that subject matter jurisdiction exists under the commercial activity and waiver exceptions to foreign sovereign immunity pursuant to the Foreign Sovereign Immunities Act. The Committee and the Emirate moved to dismiss the amended and supplemental complaints of Refco and Drexel, asserting, *inter alia*, that the district court lacked subject matter jurisdiction because the Emirate and the Committee were entitled to sovereign immunity under the FSIA. The Emirate and the Committee moved also to stay discovery. The motions were made prior to Refco ever having the opportunity to conduct any discovery, including discovery on the jurisdictional issues. The district court denied the motions to dismiss, holding that subject matter jurisdiction was present under the commercial activity and waiver exceptions of the FSIA.

In a well-reasoned opinion, the district court correctly held that Refco's and Drexel's claims for nonpayment of the original debts met the third clause of § 1605(a)(2). The court analyzed

the third clause separately focusing on each of the three elements, as did the Court in *Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160, 2164 (1992). App. 58-59a. First, the court found that the relevant acts upon which petitioners' claims were based occurred "outside the territory" of the U.S., thereby "satisfying the first aspect of the requirements of the third clause of the commercial activity exception." App. 57a. Second, the district court found that the relevant acts were "taken *in connection with* a commercial activity" outside of the U.S. *Id.* The court followed the mandate set forth by this Court in *Weltover*, 112 S. Ct. at 2165, and looked to the nature of the conduct to determine that the Emirate's takeover and management of the Union Bank and the Committee's management and winding up of Galadari's non-banking businesses were commercial activities. The court found that these acts "could have been conducted by a private party" and, indeed, were performed previously by Galadari. App. 58a. The court then determined that the requisite nexus between the "acts" upon which petitioners' claims were based and the "commercial activity" was met. Respondents' repudiation of the debts to Refco and Drexel were taken in connection with respondents' take over of Galadari and his assets. Third, the court found that the "acts" of the Emirate and the Committee -- the repudiation of the debts -- had a direct effect in the U.S. because, as in *Weltover*, the situs of the debts is in the U.S. App. 59a. The court aptly concluded that "[w]hen [the Emirate] and the Committee took over the control and management of Galadari's assets and refused to pay debts owed Drexel and Refco and payable in the United States, [the Emirate] and the Committee produced a "direct effect" in the United States." *Id.*

The district court also ruled that the Committee was the real party in interest with respect to Galadari and his businesses, and that the Committee's appearance and participation in the actions constituted an implied waiver of foreign sovereign immunity. App. 50-52a. The court found that the Committee's general appearance and answer without an immunity assertion in the Drexel action constituted a waiver of immunity. The court found a waiver of immunity also in the Committee's

appearance and opposition to Refco's motion for an order of attachment without raising the issue of immunity. In that connection, the court noted the Committee's success in obtaining Refco's agreements to adjourn its action based on the Committee's representations that Refco would be treated the same as Drexel. App. 51a.

The Second Circuit majority held that the third clause of the commercial activity exception under § 1605(a)(2) did not apply because the "gravamen" of petitioners' claims was not commercial activities of the foreign state. As shown below, the circuit court improperly interpreted the plain language of the third clause of § 1605(a)(2), which denies foreign sovereign immunity to claims based upon "an act" outside of the U.S. taken "*in connection with* a commercial activity elsewhere" and "that act causes a direct effect in the United States."

The Second Circuit majority held also that the waiver exception under § 1605(a)(1) did not apply because, despite the Committee's objective conduct evidencing a waiver, the Committee did not intend to waive foreign sovereign immunity. The Second Circuit disregarded the Committee's extensive participation in the Drexel action and the fact that the Committee opposed Refco's injunction motion without asserting its immunity holding that, despite these facts, the Committee did not intend to waive immunity.

The Chief Judge of the Second Circuit dissented from the majority opinion stating that "[I]t is premature and unfair to dismiss this complaint at this time." App. 30a. The dissent opined that "the Court has ordered the dismissal, at the pleading stage, of a lawsuit that presents novel and subtle issues concerning complicated financial maneuvering in the Emirate of Dubai...." App. 27a. The dissent criticized the majority's conclusion that the "*gravamen* of these claims *concerns* the essentially judicial role of the Committee...." App. 29-30a (emphasis in original). Recognizing "the dual nature of the Committee's activities" as serving in both "quasi-judicial" and "commercial" capacities, the dissent found that, upon the present pleadings and record, it is not possible to

determine whether the Committee's particular actions that caused petitioners' injury were "judicial" or "commercial" in nature:

> Perhaps the Committee "adjudicated" the claims of Drexel and Refco and denied them, acting like a United States bankruptcy judge. But it is also possible that the Committee, acting like a successor corporation, used fresh cash from its "parent" entity to prefer some of its creditors and simply reneged on an enforceable obligation to discharge liabilities to [Refco and Drexel].

App. 30a. Under the dissent's analysis Refco and Drexel should be given the opportunity to prove their allegations that the acts which form the bases of the claims were performed in connection with respondents' commercial activities. As shown below, such a connection is sufficient under the plain language of the third clause of § 1605(a)(2).

REASONS FOR GRANTING THE PETITION

1. The Decision Below is Contrary to the Plain Language of § 1605(a)(2) -- the Commercial Activity Exception to Foreign Sovereign Immunity.

The Second Circuit's decision misapplies the plain language of the third clause of § 1605(a)(2) in two fundamental respects. The court below erroneously determined that the "acts" upon which petitioners' claims are based must be solely the "commercial activity of the foreign state elsewhere." App. 21-25a. The court below also erroneously held that petitioners were required to establish that the direct effect in the U.S. was caused by commercial activity of the Emirate and the Committee, and not, as the statute's plain language provides, by an act "in connection with" the commercial activity. This Court should grant certiorari to review the important federal question which has been decided by the Second Circuit in a manner contrary to the plain language of the statute. In addition, the Second Circuit's interpretation of the phrase "in connection with a commercial activity" of § 1605(a)(2) has created a conflict among the circuit courts.

It is a fundamental tenet of statutory construction that statutory language is to be interpreted in accordance with its plain meaning. This Court recently reiterated this principle unequivocally and without dissent: "[w]e have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete'." *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992) (citations omitted).

This Court's decision in *Saudi Arabia v. Nelson*, 113 S. Ct. 1471 (1993) confirmed that § 1605(a)(2), like other statutes, is to be given its plain meaning. In determining the interpretation to be accorded to the first clause of § 1605(a)(2), this Court distinguished the way in which the phrase "the action is based upon" is used in the first clause from its use in the second and third clauses:

> What the natural meaning of the phrase "based upon" suggests, the context confirms. ... we noted that § 1605(a)(2) contains two clauses following the one at issue here. The second allows for jurisdiction where a suit "is based ... upon an act performed in the Untied States in connection with a commercial activity of the foreign state elsewhere," and the third speaks in like terms, allowing for jurisdiction where an action "is based ... upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." *Distinctions among descriptions juxtaposed against each other are naturally understood to be significant, ... and Congress manifestly understood there to be a difference between a suit "based upon" commercial activity and one "based upon" acts performed "in connection with" such activity. The only reasonable reading of the former term calls for something more than a mere connection with, or relation to, commercial activity.*

113 S. Ct. at 1477-78 (citations and footnotes omitted; emphasis added). Thus, while the Court interpreted the first clause of § 1605(a)(2), this Court distinguished the more stringent requirements imposed by the first clause of § 1605(a)(2) from the more lenient requirements of the second and third clauses, which require only that the act sued upon have a "mere connection with, or relation to, commercial activity." 113 S. Ct. at 1478; *see also Weltover v. Republic of Argentina*, 941 F.2d 145, 151 (2d Cir. 1991) (commercial activity for purposes of the third clause focuses "on the nature of the underlying activity, rather than on the nature of the last act, *i.e.*, the breach"), *aff'd*, 112 S. Ct. 2160 (1992).

Certiorari should be granted because, despite the plain language of the statute and this Court's observations in *Nelson*, the circuit court expressly rejected petitioners' argument that the third clause of § 1605(a)(2) requires only that the act which forms the basis of petitioners' claims occur "in connection with" a commercial activity. App. 25-26a. The circuit court dismissed the amended and supplemental complaints as against the Emirate and the Committee on the ground that the acts of the Emirate and the Committee of which petitioners complain were not themselves solely commercial in nature, but, rather, were acts taken in relation to commercial activity:

> The gravamen of [petitioners'] claims concern the essentially judicial role of the Committee ... and not any of the tangentially related commercial conduct in which the Committee or the Emirate might have engaged.
>
> * * *
>
> The "acts" upon which the claims of Drexel and Refco are "based" are essentially the adverse determination of their claims by the Committee, including the determination that Galadari had not effectively pledged Union shares to Drexel as security for payment of the Note. As the Court stated in *Nelson*, the phrase "based upon" is "read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the

> case." 113 S. Ct. at 1477 (collecting cases). If the "connection" language of § 1605(a)(2) were read, as Drexel and Refco seek, to include tangential commercial activities to which the "acts" forming the basis of the claim have only an attenuated connection, the "commercial activity" exception would effectively be rewritten to authorize the exercise of jurisdiction over acts that are essentially sovereign in nature.

App. 25a (footnote omitted; citations omitted).

The effect of the Second Circuit's misinterpretation of the statute is to impose an additional requirement for pleading a claim under the third clause of § 1605(a)(2) that is not found in the plain language of the statute. Under the Second Circuit's analysis, a court does not have subject matter jurisdiction under the third clause of § 1605(a)(2) unless the act outside the territory of the United States which forms the basis of a plaintiff's claim is commercial in nature. The Second Circuit, in effect, has revised § 1605(a)(2) to read that "a foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case ... in which the action is based ... upon a *commercial act* outside the territory of the United States *in connection with a commercial activity of the foreign state* elsewhere ..." Such is plainly not the result intended by Congress where the statute unambiguously refers to "*an act* outside the territory of the United States" and *not* to "a commercial act." In the alternative, the Second Circuit effectively has deleted the clause "an act outside the territory of the United States in connection with" from the statute and thereby altered the third clause to read "[an] action based ... upon a commercial activity of the foreign state elsewhere."

The Second Circuit's deletion of, or addition to, portions of the statute is impermissible. "The cardinal principal of statutory construction is to save and not to destroy. It is our duty 'to give effect, if possible, to every clause and word of a statute.'" *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (citations omitted); *see also Freytag v. C.I.R.*, 111 S. Ct. 2631, 2638 (1991) (expressing "'a deep reluctance to interpret

a statutory provision so as to render superfluous other provisions in the same enactment'") (citations omitted).

The circuit court's expressed concern that, if the statute were to be given its plain meaning, the commercial activity exception would authorize the exercise of jurisdiction over "essentially sovereign acts" with only an "attenuated connection" to "commercial activity" is unfounded. App. 25a. As this Court noted in *Nelson*, not even the first clause of § 1605(a)(2) requires that a plaintiff's claim be based solely upon commercial acts, without any element of sovereign conduct. 113 S. Ct. at 1478 n.4. Thus, it follows that the third clause, which expressly allows for claims based upon an act that has a more relaxed link to commercial activity, does not require that the claim be based solely upon commercial activities. Indeed, nothing in the third clause requires that the *act* upon which the claim is based be commercial. Rather, the act -- which may be sovereign -- need only occur *in connection with* commercial activity. *See, e.g., Weltover*, 941 F.2d at 151 (finding that jurisdiction existed over the government of Argentina where Argentina's sovereign act of rescheduling certain debts was taken in connection with commercial activity).

Furthermore, in the instant case, the facts as found by the district court make clear that the acts which form the bases of petitioners' claims -- the repudiation of the debts -- relate directly to the Emirate's and the Committee's acknowledged commercial conduct -- marshalling, operating and, in some cases, liquidating Galadari's assets and businesses. The Emirate infused cash into Union Bank in an effort to reorganize and to pay creditors, and the Committee carried on the business of Holdings and paid 80% of its creditors. As part and parcel of their takeover of Galadari's businesses, respondents reneged on their obligations to pay petitioners' commercial debts. The Committee's repudiation of Refco's and Drexel's claims necessarily freed up substantial funds for distribution to the Union Bank, the Emirate and other creditors. *See* App. 30a (Newman, C.J., dissenting). Indeed, the Second Circuit's determination that the Committee's refusal to pay the debts was solely sovereign in nature was erroneous. A private individual or entity could have stepped into Galadari's shoes, as did the

Emirate and the Committee, and preferred some creditors and refused to pay others.

The Second Circuit erred for the further reason that, as Chief Judge Newman declared in his dissent, "it is premature and unfair to dismiss [the] complaint[s] at this time. *Id.* The Chief Judge further observed that "I would give the plaintiffs and opportunity to develop evidence to show that their interpretation of the events is correct." *Id.* Where, as here, an issued exists as to the defendants' claim of immunity, a plaintiff should be given the opportunity to conduct discovery with respect to the jurisdictional issues. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 713 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993) ("[t]o the extent that the jurisdictional facts are disputed on remand, the parties should be allowed to conduct discovery for the limited purpose of establishing jurisdictional facts before the claims can be dismissed); *Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1332 (2d Cir. 1990), *on remand*, 87 CV 4252, 1992 U.S. Dist. LEXIS 10423 (E.D.N.Y. July 2, 1992); *Alliance of Am. Ins. v. Cuomo*, 854 F.2d 591, 597 (2d Cir. 1988) ("[b]efore dismissing a case for want of jurisdiction, a court should permit the party seeking the court's intervention to engage in discovery of facts supporting jurisdiction") (citations omitted); *see also Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988); *McKesson Corp. v. Islamic Republic of Iran*, 138 F.R.D. 1, 2 (D.D.C. 1991).

The Second Circuit further misinterpreted the plain language of § 1605(a)(2) when it held that:

> In the present case, the district court concluded that the third clause of § 1605(a)(2) applied because "[w]hen [the Emirate] took over and provided for the management of [Union]," *Drexel VII*, 810 F. Supp. at 1387, and "[w]hen the Committee marshalled, managed, and liquidated Galadari's assets," *id.*, they engaged in commercial activities outside the United States that could be conducted by a private party, and in fact had been performed by Galadari. *See id.*

> We agree that these *activities* might be regarded as *commercial, but they are not activities that "cause[d] a direct effect in the United States,"* § 1605(a)(2), upon which the claims of Drexel and Refco are based. Drexel and Refco do not claim that Union was mismanaged and that this had some detrimental "effect" upon them in the United States. Nor do they contend that the management of Galadari's assets by the Committee generated such an effect.

App. 23-24a (footnote omitted; emphasis added). The Second Circuit thus concluded that the third clause of § 1605(a)(2) requires that the act which must have a "direct effect" in the United States is the commercial activity of the Emirate and the Committee elsewhere. Again, the Second Circuit is in error.

The statute is clear: "a foreign state shall not be immune ... in any case ... in which *the action is based ... upon an act outside the territory of the United States* in connection with a commercial activity of the foreign state elsewhere *and that act causes a direct effect in the United States.*" § 1605(a)(2). The act which must cause a "direct effect in the United States" is the act outside the territory of the United States taken in connection with a commercial activity of the foreign state elsewhere. The Second Circuit was wrong to require that the wrongful acts themselves be commercial activity. It is inescapable that the phrase "and that act causes a direct effect in the United States" can refer only to the prior use of the term "act in the statute" which is the "act outside the United States."

The Second Circuit's ruling also has the effect of collapsing into a single requirement the two separate statutory requirements that a plaintiff plead that defendant engaged in (a) an act outside of the U.S., (b) which act was performed in connection with a commercial activity. Thus, in the instant case, the Second Circuit assumed that the Committee was engaged in commercial activity in winding up Galadari's affairs, but concluded that, because it deemed the acts performed by the Committee outside of the United States, *to wit*, the Committee's refusal to pay Refco's and Drexel's claims to be "adjudicative" and concerned with the Committee's "judicial" role, the

commercial acts of the Committee were subsumed within its sovereign activity and, therefore, not entitled to immunity. Again, such an interpretation runs counter to the plain statutory language and impermissibly alters terms that Congress saw fit to include in the statute. *Freytag*, 111 S. Ct. at 2638; *Menasche*, 348 U.S. at 538-39.

In addition, this Court should grant certiorari to resolve a difference among circuit courts regarding the proper interpretation to be given to the third clause. For example, the Third Circuit in *Federal Ins. Co. v. Richard I. Rubin & Co., Inc.*, Nos. 93-1157, 93-1590, 1993 U.S. App. LEXIS 33704, *58 (3d Cir. Dec. 28, 1993) based upon its reading of *Nelson*, held that the "third clause[] of the FSIA commercial activity section use[s] the 'in connection with' language, which arguably might allow for a more tenuous causal link between the claims alleged and the commercial activities [of the foreign sovereign]"); *see Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1544-45 (11th Cir. 1993) (holding that an owner of an Renault automobile involved in an accident may sue the French manufacturer of the car ["RNUR"], which was a corporation wholly owned by the French government, for personal injuries suffered on the ground that RNUR's alleged negligent design and manufacture of the car in France were acts connected to a commercial activity of RNUR outside the U.S.); *Siderman de Blake v. Republic of Argentina*, 965 F.2d at 710 (holding that plaintiffs' expropriation claims may satisfy the third clause of § 1605(a)(2) where the seizure and operation of a business in Argentina were performed "in connection with" the commercial activities of operating a hotel and managing real estate investments); *see also Stena Rederi AB v. Comision de Contratos Del Comite*, 923 F.2d 380, 386 (5th Cir. 1991) (describing the third clause of § 1605(a)(2) as requiring that "a commercial activity carried on outside the United States [have] a direct effect in the United States"). By contrast, as discussed herein, the Second Circuit has determined to apply a more restrictive interpretation to the third clause, in effect requiring that the claim be based, not upon an act "in connection with" commercial activity, but upon a commercial activity itself. This split of authority with

respect to the proper interpretation to be given to a crucial portion of the FSIA warrants resolution by this Court.

2. The Decision Below Also is Contrary to the Plain Language of § 1605(a)(1) -- the Waiver Exception to Foreign Sovereign Immunity.

The Second Circuit's decision purports to apply the rule that an implicit waiver under § 1605(a)(1) should be "unambiguous." However, the Second Circuit effectively has transformed this rule so that an implicit waiver may be found only where the foreign state does not later attempt to withdraw such waiver. The Second Circuit impermissibly inserts a subjective intent test into the rule and thereby contravenes the plain language of the statute, which explicitly states that a foreign state may waive its immunity "explicitly or by implication" and that such a waiver is effective "notwithstanding any withdrawal of the waiver the foreign state may purport to effect." *See Connecticut Nat'l Bank v. Germain*, 112 S. Ct. at 1149.

The Second Circuit did not contest the district court's findings of fact on the waiver issue. Thus, the court acknowledged that, in the Drexel case, the Committee participated extensively in that action over a period of many years without asserting immunity. Similarly, the Second Circuit did not take issue with the fact that the Committee voluntarily elected to appear in the Refco action, opposed Refco's motion for an order of attachment, argued the merits of Refco's claims and sought affirmative relief from the court also without asserting immunity. Nevertheless, the court ignored the evidence regarding the Committee's full and unequivocal participation in the Drexel and Refco actions, holding instead that the Committee's subsequent "invocations of immunity" sufficiently demonstrated its intent not to waive sovereign immunity. However, invocations of immunity occurring after the foreign state has participated and sought affirmative relief in an action constitute, at best, an impermissible attempt to withdraw a prior waiver. The clear language of § 1605(a)(1) renders the Committee's belated efforts to assert immunity a nullity.

The statute expressly gives a foreign state a choice of asserting a foreign sovereign immunity defense or participating

in litigation and thereby waiving an immunity defense. The clear effect of the waiver provision is to mandate that the foreign state abide by its choice. If the foreign state elects to litigate in a U.S. court, it is barred from later attempting to withdraw its waiver.

Section 1605(a)(1), if interpreted in accordance with its plain language, positively impacts upon litigation involving foreign states by insuring the same degree of predictability sought in all litigation. By permitting foreign states to elect to submit to litigate in U.S. courts, while maintaining the ability to assert an immunity defense at some later date, the Second Circuit has materially prejudiced U.S. litigants. It would be unfair to litigants to permit a foreign state to elect fully to participate in litigation in order to, *inter alia*, pursue comity deference based on sovereignty, lose and then get a "second bite at the apple" by belatedly claiming sovereign immunity. Predictability will best be served by requiring foreign states to assert immunity at the very outset of the litigation, and not at some later point in the litigation, after litigants have incurred significant litigation costs and the courts have expended judicial resources.

The inequity caused by the Second Circuit's misreading of § 1605(a)(1) aptly is illustrated by the facts here. Respondents elected to appear in the Refco and Drexel actions in the U.S. courts in furtherance of their effort to prevent Refco and Drexel from recovering on their claims, rather than to assert sovereign immunity from the outset. This litigation, in addition to the enormous costs incurred by petitioners, had involved the active participation of the courts, including numerous hearings, motion practice, seven opinions by the district court, and an appeal to the Second Circuit. Respondents were content to avail themselves of the U.S courts when it appeared they were going to be successful in having the U.S. actions stayed in favor of the proceedings in Dubai. It is only after certain 1991 decisions of the district court made clear that respondents might be held to be liable to Refco and Drexel and the stays were lifted did respondents determine that an assertion of sovereign immunity suited their new litigation strategy. The Second Circuit's

decision sanctions respondents' cynical and statutorily impermissible ploy.

The Second Circuit's decision also is at variance with a recent Ninth Circuit decision on the waiver exception under the FSIA. Thus, in *Siderman de Blake*, the Ninth Circuit ruled that Argentina implicitly waived its immunity in a civil action by deliberately participating in litigation in a California state court in connection with a separate Argentine proceeding, despite the invocation of an immunity defense in its first responsive pleading. 965 F.2d at 722. The Ninth Circuit held that Argentina's use of the U.S. courts in an effort to obtain jurisdiction over Siderman, prior to the institution of Siderman's lawsuit, waived any sovereign immunity Argentina may have had with respect to claims relating out of Argentina's acts. *Id.* Thus, in determining whether there has been an implied waiver, the Ninth Circuit focused solely on the objective conduct of the foreign state, rather than its subjective intent. *See Aboujdid v. Singapore Airlines, Ltd.*, 67 N.Y.2d 450, 459, 503 N.Y.S.2d 555, 559 (1986) (waiver of immunity results from "participation in and seeking affirmative benefit from the litigation, without reservation"); *see also Sea Lift, Inc. v. Refinadora Costarricense de Petroleo, S.A.*, 601 F. Supp. 457, 466 (S.D. Fla. 1984); *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 477 F. Supp. 615, 619 n.9 (S.D.N.Y. 1979), *rev'd on other grounds*, 629 F.2d 786 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981).

The decisions cited by the Second Circuit in support of its refusal to imply a waiver are inapposite. In each, the foreign state clearly had expressed at the *outset* of the litigation its intention to assert immunity. *See, e.g., Canadian Overseas Ores, Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 276 (2d Cir. 1984) (the foreign state "had previously implicitly or explicitly reserved its right to assert [FSIA] immunity in three separate documents [served in the first four months of the litigation]"); *Foremost-McKesson, Inc. v. The Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1980) (rejecting a waiver claim on the grounds that the defendant was not required to assert its immunity defense in its first answer to the complaint because of the the limited nature of the initial

pleading and the fact that the answer neither denied the allegations of the complaint nor asserted FSIA immunity but was limited to a request that the court defer to the jurisdiction of another forum); *see also Frovola v. U.S.S.R.*, 761 F.2d 370, 378 (7th Cir. 1985) (holding only that a failure to appear does not represent a "conscious decision to take part in the litigation and a failure to raise sovereign immunity despite an opportunity to do so"). None of these cases suggests that where, as here, the foreign state has appeared generally, argued the merits of plaintiff's case, opposed an injunction motion and sought affirmative relief from the court, and in a related case answered, denied the allegations of the complaint and asserted 25 affirmative defenses without asserting sovereign immunity, the sovereign may, at a later date when it suits its litigation strategy, assert immunity.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 28, 1994

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1545, 1546-August Term, 1992

(Argued: April 29, 1993 Decided: November 29, 1993)

Docket Nos. 93-7078, 93-7086

THE DREXEL BURNHAM LAMBERT GROUP INC., and REFCO, INC.,

Plaintiffs-Appellees,

- against -

THE COMMITTEE OF RECEIVERS FOR A.W. GALADARI, and THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES,

Defendants-Appellants,

- and -

A.W. GALADARI, AND A.W. GALADARI COMMODITIES, a division of A.W. Galadari Holdings (Private) Limited,

Defendants.

Before:

LUMBARD, NEWMAN,** AND MAHONEY,
Circuit Judges.

** Judge Newman became Chief Judge of the Second Circuit Court of Appeals on July 1, 1993.

Defendant-appellants in this consolidated action appeal from an order entered January 19, 1993 in the United States District Court for the Southern District of New York, Constance Baker Motley, *Judge*, that denied their motion to dismiss plaintiffs-appellees' amended and supplemental complaints on the basis of foreign sovereign immunity. Defendant-appellant the Emirate of Dubai, United Arab Emirates appeals from an order of the district court dated January 22, 1993 that denied the Emirate's motion to quash discovery.

The order denying the motion to dismiss the amended and supplemental complaints is reversed. The appeal from the order denying the Emirate's motion to quash discovery is dismissed as moot. Chief Judge Newman dissents in a separate opinion.

H. BARRY VASIOS, New York, New York (Anjali G. Asnanee, Elizabeth A. Berney, Gilbert, Segall and Young, New York, New York, of counsel), *for Defendant-Appellant The Emirate of Dubai, United Arab Emirates.*

RICHARD W. REINTHALER, New York, New York (Paul L. Friedman, Dwight A. Healy, White & Case, New York, New York, of counsel), *for Defendant-Appellant The Committee of Receivers for A.W. Galadari.*

EDWARD L. POWERS, New York, New York (Joel L. Dempsey, Richards & O'Neil, New York, New York, Thomas W. Hill, Jr. West Palm Beach, Florida, of counsel), *for Plaintiff-Appellee The Drexel Burnham Lambert Group, Inc.*

MARIANNE BRETTON-GRANATOOR, New York, New York (Jack Weinberg, Therese M. Doherty, Graubard Mollen Horowitz Pomeranz & Shapiro, New York, New York, of counsel), *for Plaintiff-Appellee Refco, Inc.*

MAHONEY, *Circuit Judge:*

Defendant-appellants The Committee of Receivers for A.W. Galadari (the "Committee") and The Emirate of Dubai, United Arab Emirates (the "Emirate") appeal form an order entered January 19, 1993 in the United States District court for the Southern District of New York, Constance Baker Motley, *Judge*, that denied their motions to dismiss the amended and supplemental complaints of plaintiffs-appellees The Drexel Burnham Lambert Group Inc. ("Drexel") and Refco, Inc. ("Refco") in this consolidated action, and directed that the Committee and the Emirate provide Drexel and Refco with security covering costs and, in the case of Refco, attorney fees. The Committee and the Emirate sought to dismiss the amended and supplemental complaints on the basis, *inter alia*, that they were entitled to sovereign immunity pursuant to Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611 (the "FSIA"), and the court accordingly lacked subject matter jurisdiction. The Emirate also appeals from a January 22, 1993 order of the district court that denied the Emirate's motion to quash discovery against the Emirate.

We reverse the order denying the motion to dismiss the complaint on the basis that the Committee and the Emirate are entitled to foreign sovereign immunity. We also dismiss as moot the appeal from the order denying the Emirate's motion to quash discovery.

Background

In this appeal, we revisit a litigation commenced more than nine years ago that has occasioned one prior opinion of this court, as well as a number of opinions by the district court. *See Drexel Burnham Lambert Group, Inc. v. Galadari*, 777 F.2d 877 (2d Cir. 1985) ("*Drexel II*"), *aff'g in part and vacating in part* 610 F. Supp. 114 (S.D.N.Y. 1985) ("*Drexel I*"); *Drexel Burnham Lambert Group, Inc. v. Galadari*, No. 84 Civ. 2602 (CBM), 1986 WL 4692 (S.D.N.Y. Apr. 17, 1986) ("*Drexel III*"); *Drexel Burnham Lambert Group Inc. v. Galadari*, No. 84 Civ. 2602, 1987 U.S. Dist. LEXIS 5030 (S.D.N.Y. Jan. 29, 1987) ("*Drexel*

IV"); *Refco, Inc. v. Galadari*, 755 F. Supp. 79 (S.D.N.Y. 1991); *Drexel Burnham Lambert Group, Inc. v. Galadari*, 134 B.R. 719 (S.D.N.Y. 1991) ("*Drexel V*"); *Drexel Burnham Lambert Group, Inc. v. Galadari*, 127 B.R. 87 (S.D.N.Y. 1991) ("*Drexel VI*"). Familiarity with these decisions, and with the decision of the district court from which the instant appeal is taken, *Drexel Burnham Lambert Group Inc. v. Committee of Receivers for A.W. Galadari*, 810 F. Supp. 1375 (S.D.N.Y. 1993 ("*Drexel VII*"), is assumed.

In April 1984, the Emirate established the Committee to wind up the business affairs and liquidate all nonbanking assets of Abdul Wahab Bin Ebrahim Galadari ("Galadari"), a citizen of Dubai, following a financial crisis in Dubai precipitated by the threatened collapse of the Union Bank of the Middle East, Ltd. ("Union"). Galadari controlled Union, one of the largest banks in the United Arab Emirates. The Committee is the successor to a provisional board of directors (the "Provisional Board") established by the government of Dubai in November 1983 to manage both Union and (until the formation of the Committee) Galadari's nonbanking assets. The Committee is comprised of four prominent citizens of Dubai, and is vested with the authority to liquidate Galadari's assets, pay Galadari's creditors, and bring and defend actions on behalf of the Galadari "estate." Decisions of the Committee may be appealed to a three-member judicial committee established for this purpose. We have noted that the decree which established the Committee "appears to be Dubai's first attempt to frame an insolvency law." *Drexel II*, 777 F.2d at 881.

Galadari had served as chairman of Union's board of directors, and had also controlled A.W. Galadari Holdings (Private) Ltd. ("Holdings"), a Dubai corporation that owned forty-six percent of Union's stock. Galadari's business ventures also included A.W. Galadari Commodities ("Commodities"), a partnership managed by Galadari that engaged in commodities trading on United States exchanges. Commodities conducted trading through, *inter alia*, accounts maintained with Drexel and Refco.

A. *The Drexel Action.*

The Drexel action stems from certain trading losses incurred by Galadari in 1982 and covered by a Drexel affiliate, Drexel Burnham Lambert International, N.V. ("Drexel International"). In satisfaction of the resulting debt, Galadari and Commodities provided a promissory note (the "Note") in the amount of $19,465,000 to Drexel International, secured by a pledge of 6,068,640 shares of Union stock. Drexel International assigned the Note to Drexel in October 1982.

Galadari and Commodities made some payments of principal on the Note that reduced the principal outstanding by $7,000,000, as well as some payments of interest, but defaulted and ceased payments in February 1984. Drexel made an initial demand for payment of the balance due on the Note to the Provisional Board, which the Board rejected. On April 12, 1984 Drexel instituted the present action against Galadari and Commodities seeking recovery on the Note. On April 17, 1984, the Committee was established by royal decree to wind up Galadari's affairs.

On May 17, 1984, the Committee filed an answer to Drexel's complaint "on behalf of Galadari and Commodities" that set forth numerous affirmative defenses, including (1) lack of subject matter jurisdiction, and (2) deference in favor of proceedings conducted by the Committee on the basis of (a) international comity, and (b) the act of state doctrine. The Committee did not then assert the defense of foreign sovereign immunity.

On May 24, 1984, Drexel moved for summary judgment. The Committee cross-moved to stay or dismiss the action on the grounds of (1) lack of subject matter jurisdiction, (2) international comity, and (3) the act of state doctrine. The district court denied Drexel's motion and the Committee's cross-motion insofar as it rested upon lack of subject matter jurisdiction and the act of state doctrine, but dismissed the complaint on the basis of international comity. *See Drexel I*, 610 F. Supp. at 117-19.

Drexel appealed from the dismissal on the basis of comity, and the Committee cross-appealed from the refusal to dismiss on grounds of subject matter jurisdiction and the act of state doctrine. We affirmed on the cross-appeal, but vacated the dismissal of the action and remanded for an evidentiary hearing on the question whether comity called for deference to the Committee's proceedings in Dubai. *See Drexel II*, 777 F.2d at 881-82. We noted that "our courts have had not experience with Dubai bankruptcy practices and procedures," *id.* at 881, and that Drexel had not had an opportunity to conduct discovery regarding these procedures. *See id.*

Drexel then moved in the district court to enjoin the Committee from proceeding with the adjudication of Drexel's claim in Dubai. In a memorandum of law filed in response to Drexel's motion, the Committee noted that "Drexel's application for injunctive relief represents the first time in the is action that any claim for relief has been asserted against the Committee itself, as distinguished form the two named defendants," and added that "[i]f Drexel believes it has a basis for a claim against the Committee, it should be required to move for leave to amend its complaint or bring a new action, naming the Committee as a defendant ... and providing the Committee with a proper opportunity to ... assert its immunity from suit under the [FSIA]."

The district court denied Drexel's application for a preliminary injunction. *See Drexel III*, 1986 WL 4692 at *1-2. In a subsequent opinion, the district court found that "[t]he Dubai bankruptcy decree and proceedings at issue here have been shown by [the Committee] to be consistent with our basic notions of fairness and due process" and to be "fundamentally fair to all creditors." *Drexel IV*, 1987 U.S. Dist. LEXIS 5030 at *49. The district court accordingly stayed this action pending resolution of Drexel's claims in Dubai. *Id.* at *71.

B. *The Refco Action*

As in the case of Drexel, the dispute concerning Refco originated in trading losses incurred by Galadari and

commodities and covered by Refco. It is undisputed that Galadari and Commodities owed Refco $6,109,664.20 pursuant to (1) a customer agreement between Refco and Galadari dated March 24, 1983, and (2) a letter agreement dated July 6, 1983 that was executed by Galadari on his and Commodities' behalf. The letter agreement acknowledged the $6,109,664.20 debt and specified terms of repayment. Refco received $1.5 million in payments on this debt, leaving an outstanding balance of $4,609,664.20.

In August 1984, Refco brought suit against Galadari and Commodities in the Supreme Court of the State of New York, County of New York, to collect this debt. In that action, Refco obtained a temporary restraining order to bar the sale or encumbrance of any and all assets held by Galadari and Commodities or by others for their account, and also sought to attach and levy upon such property. The Committee appeared in the New York court to oppose this application on the grounds of (1) fairness to other creditors in the Dubai liquidation proceedings, and (2) international comity. In an order dated March 27, 1985, the New York court (Kenneth Shorter, *Justice*) declined to continue the restraining order except as it related to a condominium apartment in New York City maintained by Galadari's family and owned by a Bermuda corporation, all of whose outstanding shares were owned by Galadari and/or his wife, and denied the application for an attachment. The New York court also ruled *sua sponte* that "[t]he [Committee] shall be added as an additional party." *Refco, Inc. v. Galadari*, No. 18541/84, slip op. at 4 (N.Y. Sup Ct., N.Y. County Mar. 27, 1985).

Subsequently, in a September 1985 memorandum of law "submitted by additional defendant, the Committee of Receivers" in support of a motion to dismiss or stay the state court action, the Committee asserted that under the FSIA, the state court did not have personal or subject matter jurisdiction over the Committee. By stipulation of the parties, the motion was thereafter withdrawn, and the action was stayed in the New York court upon representations by the Committee that it was actively engaged in reviewing

Refco's claims in proceedings in Dubai. In January 1990, Refco refused to consent to further adjournments in favor of proceedings in Dubai, and the Committee removed the action to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1441(d) (1988). The case was assigned to Judge Motley, who in January 1991 (1) denied Refco's motion to remand the case to state court, (2) consolidated the removed action with the Drexel action, and (3) stayed the consolidated action pending the outcome of the proceedings in Dubai. *See Refco*, 755 F. Supp. at 84.

Finally, when the Committee ultimately served an answer to Refco's initial complaint in July 1991, it asserted foreign sovereign immunity among its affirmative defenses.

C. *The Consolidated Action*

The key issue in the Dubai proceedings was whether, as Drexel and Refco contended, Commodities was a division of Holdings, with the result that the claims of Drexel and Refco against Commodities could be satisfied from the assets of Holdings. Holdings had significant liquid assets, but Commodities did not. In attempting to resolve this issue, the Committee held a series of hearings reviewed documents and expert opinions submitted by the parties, and commissioned an independent review of the books and records of both Commodities and Holdings. With no decision forthcoming by early 1991, however, Drexel and Refco moved in the district court to vacate the stay, claiming that the Dubai proceedings should not longer be accorded comity because they had been conducted in an unfair manner and inordinately delayed in an attempt to deny their legitimate claims.

The district court rendered opinions dated March 19, 1991 (*Drexel V*) and April 8, 1991 (*Drexel VI*) in response to the applications by Drexel and Refco, respectively, to vacate the stay. The court agreed with the contentions of Drexel and Refco that the Committee had unfairly considered and unjustifiably delayed resolution of the "relatively simple" Holdings/Commodities question citing, *inter alia*, (1) numerous expert opinions regarding the issue to which the Committee had access but which had apparently failed

to resolve the matter, (2) continued representations of the Committee to the district court that a decision on this question was imminent, and (3) a conflict of interest on the part of a counsel who both represented the Committee in the district court action in contesting the claims of Drexel and Refco and served as a legal advisor to the Committee in Dubai. *See Drexel V*, 134 B.R. at 722-28; *Drexel VI*, 127 B.R. at 93-100. The court also expressed the view that the Committee was orchestrating a determination adverse to Drexel and Refco in contravention of the evidence presented to it. *See Drexel VI*, 127 B.R. 98-99. Accordingly, the district court ruled that unless the Committee rendered a decision on the outstanding claims by April 16, 1991, the stay would be vacated.

On April 14, 1991 the Committee rendered its decision (1) conceding the indebtedness of Galadari and Commodities to Drexel and Refco, but (2) rejecting the contention of Drexel and Refco that Commodities was a division of Holdings and that Holdings was accordingly liable for the debts of Commodities, and (3) ruling that Drexel's Note was not properly secured by Galadari's pledge of Union shares. Drexel and Refco appealed the Committee's decision in Dubai,[1] and also moved in district court to vacate the outstanding stay. In a order entered July 1, 1991, the district court granted the motion to vacate the stay, noting as "another example of fundamental unfairness and a denial of due process" the fact that the appeal of the Committee's decision would be heard in arabic rather than English, although the proceedings before the Committee had been conducted in English.

The Committee then filed an amended and supplemental answer to Drexel's complaint, as before "in its representative capacity on behalf of defendants Galadari and Commodities." The Committee did not plead the defense of foreign sovereign immunity, but asserted affirmative defenses calling for deference to the Committee's prior determination on the

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[1] The parties have not indicated the disposition of this appeal.

basis of comity, New York law regarding the recognition of foreign judgments, and res judicata.

Thereafter, with leave of the district court and over the Committee's objections citing, *inter alia*, the FSIA, Drexel and Refco filed amended and supplemental complaints that asserted new claims for relief directly against the Committee and the Emirate. These new claims alleged that: (1) the Committee and the Emirate were responsible as successors-in-interest for the liabilities of Galadari, Commodities, and Holdings; (2) the Committee and the Emirate had breached promises and representations to Drexel and Refco that their claims would be fairly adjudicated in the Dubai proceedings; and (3) the committee's wrongful refusal to pay these claims constituted and unlawful taking of property without just compensation in violation of international law.

The parties then entered into a stipulation dated March 18, 1992 by which the Committee's counsel agreed to accept service of the amended and supplemental complaints and related documents "on behalf of defendant The Committee of Receivers, *qua* Committee and as representative of [Galadari, Commodities and Holdings." The stipulation, however, was

> without prejudice to and [did] not constitute a waiver of:
>
> (a) the merits of any jurisdictional or other defenses the Committee may have with respect to the claims set forth in the Amended and Supplemental complaints ...;
>
> (b) any arguments or claims that Refco and/or Drexel may have that the Committee, through its prior participation in the proceedings in this court and in the New York state court prior to removal of the Refco action, assumed the status of a "party" and/or waived the defense, if any, of sovereign immunity;

(c) the Committee's contrary position with respect to paragraph [b] hereof; and

(d) any argument or claims that any party may have with respect to whether the Committee is a political subdivision, agency or instrumentality, and/or alter ego of the [Emirate].

On June 8, 1992, the Committee answered Drexel's amended and supplemental complaint "in its representative capacity on behalf of defendants Galadari and Commodities only" without asserting the defense of foreign sovereign immunity, while again asserting affirmative defenses calling for deference to the Dubai proceedings. The Committee answered the Refco amended and supplemental complaint similarly, but added the affirmative defenses of *forum non conveniens* and absence of personal jurisdiction over the defendants.

On August 24, 1992, the Emirate moved to dismiss the amended and supplemental complaints on the basis of foreign sovereign immunity pursuant to the FSIA, lack of personal jurisdiction over the Emirate, the act of state doctrine, judicial immunity, and "the applicable statutes of limitation."[2] The Emirate also moved to quash discovery against the Emirate. The district court denied these motions, concluding that the Committee and the Emirate had implicitly waived foreign sovereign immunity "[b]ecause the Committee voluntarily intervened as the real party in interest

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[2] As nearly as we can ascertain, the notice of motion and supporting papers were filed only on behalf of the Emirate, but the Committee subsequently filed a reply affidavit and reply declaration in support of the motion to dismiss. The district court stated that the Emirate and the Committee "separately move[d] to dismiss the amended and supplemental complaints. *Drexel VII*, 810 F. Supp. at 1377. We proceed on the basis that both the Emirate and the Committee moved to dismiss on the indicated grounds.

in both federal and state proceedings and filed responsive pleading[s] without preserving its right to sovereign immunity," and because the Emirate "appeared through its agent the Committee without preserving immunity." *Drexel VII*, 810 F. Supp. at 1384-85; *see* 28 U.S.C. § 1605(a)(1)(1988). The court ruled alternatively that the Committee and the Emirate were not entitled to FSIA immunity because the Committee and the Emirate had engaged in commercial activity in Dubai that directly affected Drexel and Refco in the United States. *See Drexel VII*, 810 F. Supp. at 1385-88; 28 U.S.C. § 1605(a)(2)(1988).

The court also rejected proffered defenses of absence of personal jurisdiction, *id.* at 1388-90, the act of state doctrine, *id.* at 1390-91, judicial immunity, *id.* at 1391-92, and the statute of limitations. *Id.* at 1392. The district court granted a motion by Drexel and Refco that the Committee and the Emirate be required to provide Drexel and Refco with security covering costs and, in the case of Refco, attorney fees. *Id.* at 1392-93. Finally, in a January 22, 1993 bench ruling, the district court denied the Emirate's motion to quash discovery.

These appeals followed. In response to motions by the Committee and the Emirate, this court stayed all proceedings in the district court pending the determination of this appeal and expedited the appeal. In addition, we dismissed on jurisdictional grounds the Committee's appeal from the district court's decision to grant security for costs to Drexel and Refco.

Discussion

The district court correctly concluded that insofar as the amended and supplemental complaints assert claims directly against the Emirate and the Committee as an instrumentality of the Emirate, the FSIA provides the sole basis for subject matter jurisdiction in United States Courts. *See Drexel VII*, 810 F. Supp. at 1379-80 (*citing Republic of Argentina v. Weltover, Inc.*, 112 S. Ct. 2160, 2164 (1993); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989)); *see also Saudi Arabia v. Nelson*, 113 S. Ct.

1471, 1476 (1993); *NYSA-ILA Pension Trust Fund v. Garadua Indonesia*, No. 93-7230, slip op. 6411, 6415-16 (2d Cir. Oct. 6, 1993) (citing *Amarada Hess*, 488 U.S. at 434). When review of a denial of a motion to dismiss for lack of subject matter jurisdiction under the FSIA is sought, "[w]e have appellate jurisdiction pursuant to the 'collateral order doctrine' of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-47 (1949)." *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 147 (2d Cir. 1991) (citing *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 443 (D.C. Cir. 1990)), *aff'd*, 112 S. Ct. 2160 (1992).

Because the issues presented for consideration on this appeal involve the application of the FSIA to essentially undisputed facts, we review *de novo*. *See Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1016-17 (2d Cir. 1991). As to the waiver issue, while we have recognized some discretion on the part of district courts to determine whether a waiver of FSIA immunity has occurred in a particular case, *see Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 278 (2d Cir. 1984), a review for abuse of discretion yields the same outcome in this case, because "[a]buse of discretion can be found if the district court incorrectly applied the law." *Nikon Inc. v. Ikon Corp.*, 987 F.2d 91, 94 (2d Cir. 1993) (citing *Bristol-Myers Squibb Co. v. McNeill-P.P.C., Inc.*, 973 F.2d 1033, 1038 (2d Cir. 1992)). In our view, the district court incorrectly applied the law regarding both the "waiver and "commercial activity" exceptions to the general rule of foreign sovereign immunity provided by the FSIA.

A. *The Applicable Provisions of the FSIA.*

The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604 (1988). The Emirate is a foreign state, and the parties do not dispute that the Committee is an "agency or instrumentality" of the Emirate as defined in 28 U.S.C. § 1603(a) and (b)(1988), and thus

subject to FSIA. The exceptions at issue in this case are provided by § 1605(a)(1) and (2), which provides that:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case --
>
> > (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver; [or]
> >
> > (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States....

"Under the [FSIA], a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject matter jurisdiction over a claim against a foreign state." *Nelson*, 113 S. Ct. at 1476 (citing *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488-89 (1983)); *see also Weltover*, 112 S. Ct. at 2164; *Amerada Hess*, 488 U.S. at 434-35. Furthermore,

> [o]nce the defendant presents a prima facie case that it is a foreign sovereign, the plaintiff has the burden of going forward with showing that, under exceptions to the FSIA, immunity should not be granted, *Baglab Ltd. v. Johnson Matthey Bankers Ltd.*, 665 F. Supp. 289, 293-94 (S.D.N.Y. 1987), although the ultimate burden or persuasion remains with the alleged foreign

sovereign. *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285-289 n. 6 (5th Cir. 1989).

Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1016 (2d Cir. 1993); *see also Drexel VII*, 810 F. Supp. at 1380-81 (discussing burden shifting in FSIA cases).

We now consider, against this background, the specific exceptions to FSIA immunity at issue in this case.

B. *The Waiver Exception.*

The district court looked to our ruling in Shapiro, and the legislative history cited in that case, to provide the standard by which to determine this issue. We said in Shapiro:

> Federal courts have been virtually unanimous in holding that the implied waiver provision of Section 1605(a)(1) must be construed narrowly. *See, e.g., Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990); *Joseph v. Office of the Consulate General*, 830 F.2d 1018, 1022 (9th Cir. 1987), *cert. denied*, 485 U.S. 905, 108 S. Ct.1077, 99 L.Ed.2d 236 (1988); *Frolova v. USSR*, 761 F.2d 370, 377 (7th Cir. 1985); *L'Europeenne de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 123 (S.D.N.Y. 1988). This approach is derived form the legislative history of the FSIA, in which Congress specified three examples of implied waiver. The House Report thus states:
>
> > With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. *An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.*

> H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6617. *These examples involve circumstances in which the waiver was unmistakable, and courts have been reluctant to find an implied Waiver where the circumstances were not similarly unambiguous.*

930 F.2d at 1017 (emphasis added).

The district court concluded that the Committee had met the *Shapiro* standard for waiving FSIA immunity by filing responsive pleadings in this litigation without preserving its immunity. *Drexel VII*, 810 F. Supp. at 1383-84. The court quoted, *id.* at 1383, our statement in *Drexel II* that: "In response to Drexel's suit upon the promissory note, the Committee appeared generally and asserted twenty-five affirmative defenses." 777 F.2d at 880. The court stressed that FSIA immunity was not among them. *Drexel VII*, 810 F. Supp. at 1383. Similarly, the court emphasized that "in the Refco action, the Committee appeared in 1984 and opposed Refco's motion for an order of attachment without raising the issue of sovereign immunity." *Id.* Rather, the Committee "argued that Refco's motion should be denied or stayed upon comity principles." *Id.*

The district court rejected the Committee's contention that it appeared only in a representative capacity in behalf of Galadari and Commodities at these early junctures in the Drexel and Refco actions. Rather, the court opined that the Committee and the Emirate were the "real parties in interest" in the litigation as a result of the Emirate's taking control of Union, some of whose shares were used to secure the Note provided by Galadari and Commodities to Drexel, and the Committee's marshalling and liquidation of Galadari's nonbanking assets. *Id.* at 1384. The court concluded:

> Because the Committee voluntarily intervened as the real party in interest in both federal and state proceedings and filed responsive pleading[s] without preserving its right to sovereign immunity, the Committee has failed to meet its burden of proving that it did not implicitly waive its right to immunity. Addi-

> tionally, because [the Emirate] is the real party in interest as to Galadari's banking assets and appeared through its agent the Committee without preserving immunity, [the Emirate] has failed to meet its burden of proving that it did not implicitly waive immunity. This court, therefore, has subject matter jurisdiction under the waiver exception of the FSIA as to both the Committee and [the Emirate].

Id. at 1384-85.

This conclusion is at least implicitly premised upon a passage of legislative history quoted in *Shapiro*: "An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity." *Shapiro*, 930 F.2d at 1017 (quoting H.R. Rep. No. 1487 at 18). *Shapiro* further counsels that in evaluating this conclusion, we must bear in mind that "the implied waiver provision of Section 1605(a)(1) must be construed narrowly," *id.* (collecting cases), and that any waiver must accordingly be "unmistakable" and "unambiguous." *Id.*

The Committee and the Emirate were first named as parties defendant in the amended and supplemental complaints filed by Drexel and Refco in the consolidated action. The answers to those complaints, made by the Committee "in its representative capacity in behalf of defendants Galadari and Commodities only," did not assert the defense of FSIA immunity. They were followed almost immediately, however, by a motion to dismiss that did assert the defense. In addition, the Committee had previously: (1) responded to a motion by Drexel to enjoin the Committee's Dubai proceedings by soliciting the district court to require Drexel to amend its complaint to name the Committee as a party as a condition of seeking relief directly against the Committee, pointing out that the Committee would thus be provided the opportunity to assert FSIA immunity; (2) moved to dismiss the Refco action in New York Supreme Court on the basis of FSIA immunity promptly after that court added the Committee as party to that action *sua*

sponte; (3) asserted FSIA immunity as a defense in the initial answer that the Committee filed in the Refco action after it was removed to federal court; (4) cited the FSIA in its opposition to the motions of Drexel and Refco for leave to file amended and supplemental complaints in the consolidated action naming the Committee and the Emirate as defendants; and (5) preserved the defense of FSIA immunity in the stipulation by which the Committee agreed to accept service of the amended and supplemental complaints.

We cannot read such a record as providing the "unmistakable" and "unambiguous" waiver of FSIA immunity that is required by *Shapiro*. The common sense interpretation of the legislative history cited by *Shapiro* is that the filing of a responsive pleading is the *last chance* to assert FSIA immunity if the defense has not been previously asserted. When, as in this case, the filing of answers to the amended and supplemental complaints in the consolidated action was preceded by five invocations of FSIA immunity, including the Committee's initial answer to a Refco complaint, and almost immediately followed by a motion to dismiss on the ground, *inter alia*, of FSIA immunity, we perceive no basis to find that a § 1605(a)(1) waiver has occurred.

This analysis is also supported by our ruling in *Canadian Overseas*. In that case, no responsive pleading was ever filed, but the defendant claiming FSIA immunity ultimately moved to dismiss on that basis, after moving to dismiss or stay on other grounds more than two years earlier without asserting FSIA immunity. However, the defendant had previously "implicitly or explicitly reserved its right to assert [FSIA] immunity in three separate documents - its petition for removal, its memorandum in opposition to remand and [a] stipulation concerning the amended complaint." 727 F.2d at 276. We affirmed the dismissal that was granted in response to the second motion to dismiss, while noting "the discretionary authority of district courts to effect an earlier resolution of the [FSIA immunity] issue by requiring, on the motion of a party or *sua sponte*, assertion or abandonment of the defense prior to the submission of a responsive pleading." *Id.* at 278. We also concluded that although

"district courts have discretion to determine that the conduct of a party in litigation does constitute a waiver of [FSIA] immunity in light of the circumstances of a particular case" regarding the party's conduct in the litigation, *id.*, the district court had not exceeded its discretion by refusing to find a waiver in view of (1) the defendant's assertion on three occasion of an intention to asset the defense, and (2) the fact that the litigation had been dormant for a considerable period of time.

The Committee's essential effort in this litigation has been to persuade the district court to defer to the proceedings before the Committee in Dubai. In *Foremost-McKesson*, a similar case, the Court of Appeals for the District of Columbia determined that the Republic of Iran should be allowed to assert the defense of FSIA immunity in an amended answer, even though its initial answer did not do so, because of the limited nature of the initial pleading. In that case, the plaintiffs sued the Republic of Iran, contending that Iran had illegally divested the plaintiffs of their ownership rights in a dairy. *See* 905 F.2d at 440-41. Iran filed an "Answer to Complaint" in response to plaintiffs' complaint that neither denied the allegations of the complaint nor asserted FSIA immunity. *See id.* at 441, 444. Instead, Iran maintained that any claims that the plaintiffs had were required to be brought before a claims tribunal established for that purpose. *See id.* Following the decision of that body, plaintiffs sought to renew their lawsuit, and the district court granted Iran's resulting motion to amend its answer to assert the defense of FSIA immunity despite Iran's previous silence on this issue. *Id.* at 442.

On appeal, the court rejected the plaintiffs' claim that Iran had impliedly waived FSIA immunity and should not have been allowed to amend its answer to assert that defense. The court stated:

> Foremost is correct in asserting that, *in most instances*, a state's failure to assert sovereign immunity in a responsive pleading will constitute a waiver of the defense. But the situation here is different because, in

1982, Iran did not respond substantively to any of the averments in the complaint or pose any defenses to the claims; instead, Iran merely argued that the action should proceed in another forum, which it then did. Iran's actions in these circumstances did not constitute an implied waiver.

It is true that the House Report accompanying FSIA provides that "[a]n implicit waiver would ... include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity." H. Rep. No. 1487, 94th Cong., 2d Sess. 18 (1976), U.S. Code Cong. & Admin. News 1976, pp. 6604, 661[7]. We agree with the Seventh Circuit, however, that the example of an implied waiver

> given the legislative history - filing a responsive complaint without raising an immunity defense - demonstrates that Congress anticipated, at a minimum, that waiver would not be found absent a *conscious decision* to take part in the litigation *and* a *failure to raise sovereign immunity* despite the opportunity to do so.

Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 378 (7th Cir. 1985) (citation omitted). Iran's 1982 Answer does not exhibit such a conscious decision or opportunity.

Id. at 443-44 (emphasis added). Although the analogy to *Foremost-McKesson* is not perfect, that case affords strong support to our conclusion that on the overall record in this case, no implicit waiver of FSIA immunity may properly be attributed to the Committee and the Emirate.

We also conclude that the district court's ruling that the Committee was the "real party in interest" with respect to the nonbanking assets of Galadari and Commodities, and that the Emirate should be so regarded with respect to the Union shares that Galadari pledged ot Drexel, *see Drexel VII*, 810

F. Supp. at 1384, cannot form an alternate basis for a finding of implied waiver of FSIA immunity. The thrust of this ruling is to deprecate the Committee's claims that it appeared in a representative capacity in behalf of Galadari and Commodities until the committee and the Emirate were explicitly named as defendants in the amended and supplemental complaints in the consolidated action. The view taken regarding the "real party in interest" question, however, does not materially affect the nature of the Committee's involvement in the earlier stages of the litigation. Assuming *arguendo* that the Committee, despite its intention to appear in a representative capacity, should be deemed to have appeared generally because it was the "real party in interest," the question remains whether, given its understanding of its position, the Committee adequately signalled the present or future invocation of FSIA immunity. However its participation is regarded, the Committee consistently invoked FSIA immunity, or reserved the right to do so in the future, to an extent that precludes a determination that FSIA immunity was unambiguously and unmistakably waived.

C. *The Commercial Activity Exception.*

The district court determined that the Committee and the Emirate were not entitled to FSIA immunity not only because they had implicitly waived that immunity within the meaning of § 1605(a)(1), but also because they had engaged in activity that feel within the "commercial activity" exception contained in the third clause of § 1605(a)(2). This exception provides for subject matter jurisdiction in cases "in which the action is based upon ... an act outside the territory of the United States in connection with a commercial activity in the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1603(d) defines "commercial activity" to mean

> either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or

particular transaction or act, rather than by reference to its purpose.

The Supreme Court has specified that "a state engages in commercial activity [within the meaning of § 1605(a)(2)] where it exercises '"only those powers that can also be exercised by private citizens,"' as distinct from those '"powers peculiar to sovereigns."'" *Nelson*, 113 S. Ct. at 1479 (quoting *Weltover*, 112 S. Ct. at 2166 (quoting *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 704 (1976) (plurality opinion))). In *Nelson*, the Court addressed the claim of a United States citizen who alleged that he had been recruited in the United States by an agency of Saudi Arabia for employment in that nation, and was subsequently imprisoned and tortured there for complaining about workplace safety hazards. 113 S. Ct. at 1474-75. The Court held that the victim's intentional tort claims, *see id.* 1475-76, and claims for "negligent failure to warn" of this danger, *see id.* at 1476, as well as derivative claims brought by his spouse, *see id.*, were not premised upon "commercial activity" by Saudi Arabia within the meaning of § 1605(a)(2). *See id.* at 1478-1481. The Court stated:

> We emphasized in *Weltover* that whether a state acts "in the manner of" a private party is a question of behavior, not motivation:
>
> > "[B]ecause the Act provides that the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose,' the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "'trade and traffic or commerce.'" *Weltover, supra*, at __, 112 S. Ct., at 2166 (citations omitted) (emphasis in original).

> We did not ignore the difficulty of distinguishing "'purpose' *(i.e.,* the *reason* why the foreign state engages in the activity) from 'nature' (i.e., the outward form of the conduct that the foreign state performs or agrees to perform)," but recognized that the [FSIA] "unmistakably commands" us to observe the distinction. 504 U.S., at ___, 112 S. Ct., at 2167 (emphasis in original).

Nelson, 113 S. Ct. at 1479. Because the exercise of police power had historically been understood to be a "peculiarly sovereign" function, the Court concluded that the plaintiffs had failed to state a claim based upon § 1605(a)(2) "commercial activity." *Id.*

Weltover was an action brought by bondholders for breach of contract in response to a unilateral rescheduling of the bond payments by the Republic or Argentina. 112 S. Ct. at 2163-64. The unanimous Court ruled that Argentina's rescheduling of this debt was undertaken "in connection with a commercial activity" of Argentina, and had a "direct effect [upon bondholders] in the United States," within the meaning of the third clause of § 1605(a)(2). *Weltover*, 112 S. Ct. at 2165-69. The Court noted that the bonds were "garden-variety debt instruments" (1) held by private parties (2) freely negotiable (except in Argentina), and (3) the source of a stream of cash income over time. *Id.* at 2166. Argentina contented that the bonds had been issued "to address a domestic credit crisis, and as a component of a program designed to control that nation's critical shortage of foreign exchange." *Id.* at 2167. The Court responded that under the definition of "commercial activity" provided by § 1603(d), which direct attention to the "nature," rather than the "purpose," of the activity under examination, "it is irrelevant *why* Argentina participated in the bond market in the manner of a private actor; it matters only that it did so." *Id.*

In the present case, the district court concluded that the third clause of § 1605(a)(2) applied because "[w]hen [the Emirate] took over and provided for the management of

[Union]," *Drexel VII*, 810 F. Supp. 1387, and "[w]hen the Committee marshalled, managed, and liquidated Galadari's assets," *id.*, they engaged in commercial activities outside the United States that could be conducted by a private party, and in fact had been performed by Galadari. *See id.*

We agree that these activities might be regarded as commercial,[3] but they are not activities that "cause[d] a direct effect in the United States," § 1605(a)(2), upon which the claims of Drexel and Refco are based. Drexel and Refco do not claim that Union was mismanaged and that this had some detrimental "effect" upon them in the United States. Nor do they contend that the management of Galadari's assets by the Committee generated such an effect. Rather, their claims, explicitly set forth in their amended and supplemental complaints, are that (1) the Committee and the Emirate were responsible as successors-in-interest for the liabilities of Galadari and Commodities, (2) the Committee and the Emirate had breached promises and representations to Drexel and Refco that their claims would be fairly adjudicated in the Dubai proceedings; and (3) the Committee's wrongful refusal to pay these claims constituted an illegal taking of property without just compensation in violation of international law. The gravamen of these claims concerns the essentially judicial role of the Committee in marshalling the assets of Galadari and Commodities and adjudicating the claims of their creditors, including Drexel

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[3] Even the depiction of these activities as "commercial" is, however, suspect. *Cf. In re Beck Indus. (Rothberg v. Kirschenbaum)*, 725 F.2d 880, 887 (2d Cir. 1984) ("'Merely to attempt ot collect and liquidate the assets of a debtor is not to carry on its business in any proper sense of the term.'") (quoting *Austrian v. Williams*, 216 F.2d 278, 285 (2d Cir. 1954), *cert. denied*, 348 U.S. 953 (1955)); Accord, *In re Fidelity Mortgage Investors, Inc. (Fidelity Mortgage Investors v. Camelia Builders, Inc.)*, 550 F.2d 47, 57 (2d Cir. 1976) (quoting *Austrian*, 216 F.2d at 285), *cert. denied*, 429 U.S. 1093 (1977).

and Refco, and not any of the tangentially related commercial conduct in which the Committee or the Emirate might have engaged. *But see supra* note 3.

Drexel and Refco contend, on the contrary that the third clause of § 1605(a)(2) requires only that the foreign act that causes a direct effect in the United States occur "in connection with" a commercial activity, and (in effect) that the Committee's adverse adjudicative act was adequately connected to its assertedly commercial activities to satisfy the statute. They cite in this regard Nelson's observation that "Congress manifestly understood there to be a difference between a suit 'based upon' commercial activity [i.e., a suit brought under the first clause of § 1605(a)(2)] and one 'based upon' act performed 'in connection with' such activity [i.e. one brought under the second and third clauses of § 1605(a)(2)]." *Nelson*, 113 S. Ct. at 1478. They also invoke in support of their argument *L'Europeenne de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 119-120 (S.D.N.Y. 1988), and *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 709 n.10 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1812 (1993). We are unpersuaded.

The "acts" upon which the claims of Drexel and Refco are"based" are essentially the adverse determination of their claims by the Committee, including the determination that Galadari had not effectively pledged Union shares to Drexel as security for payment of the Note. As the Court stated in Nelson, the phrase "based upon" is "read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." 113 S. Ct. at 1477 (collecting cases). If the "connection" language of § 1605(a)(2) were read, as Drexel and Refco seek, to include tangential commercial activities to which the "acts" forming the basis of the claim have only an attenuated connection, the "commercial activity" exception would effectively be rewritten to authorize the exercise of jurisdiction over acts that are essentially sovereign in nature. *See Foremost-McKesson*, 905 F.2d at 450 (exception provided by third clause of § 1605(a)(2) inapplicable when "alleged commercial acts were subsumed within a sovereign activity"). We

do not read the Supreme Court's rulings in *Nelson* and *Weltover* to support such a construction of 1605(a)(2).

The cases cited by Drexel and Refco do not call for a different conclusion. *L'Europeenne* addressed only the "direct effect in the United States" language of the third clause of § 1605(a)(2), 700 F. Supp. at 121-22, and did not involve any adjudicative activity by the foreign entity that claimed FSIA immunity. *Siderman* noted that the "intervention and operation" of a foreign bank by a foreign entity could constitute § 1605(a)(2) "commercial activity." 965 F.2d at 709 n.10; *but see Baglab Ltd. v. Johnson Matthey Bankers Ltd.*, 665 F. Supp. 289, 294 (S.D.N.Y. 1987) ("The nationalization of a bank is a quintessential sovereign activity and may not serve as the basis for a suit against the Bank.") (citing *Alberti v. Empresa Nicaraguense*, 705 F.2d 250 (7th Cir. 1983); *Cary v. National Oil Corp.*, 453 F. Supp. 1097 (S.D.N.Y. 1978), *aff'd*, 592 F.2d 673 (2d Cir. 1979) (per curiam)). The case involved "causes of action arising out of the torture of Jose Siderman and the expropriation of the Sidermans' property by Argentine military officials." 965 F.2d at 702.

The decree that established the Committee specified that it was to be the exclusive arbiter of disputes concerning claims to Galadari's assets, including claims regarding purported security interests held in Union by Galadari's creditors. Neither the resolution of creditors' claims against the Galadari estate nor the determination of which Union creditors held valid security interest in that bank constituted activity that could have been performed by private parties.[4]

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[4] Our dissenting colleague confesses an inability to discern, under the unfamiliar laws and practices of Dubai, "whether the particular actions of the committee that caused injury to the plaintiffs really were judicial," invoking our observation eight years ago that "our courts have had no experience with Dubai bankruptcy practices and procedures." *Drexel II*, 777

(continued...)

Accordingly, § 1605(a)(2) does not strip the Committee and the Emirate of FSIA immunity in this action.

Conclusion

In view of the foregoing, we need not address the other issues considered by the district court. The order denying the motion to dismiss the amended and supplemental complaints is reversed; the district court is directed to dismiss the amended and supplemental complaints. The appeal form the order denying the Emirate's motion to quash discover is dismissed as moot.

JON O. NEWMAN, *Chief Judge*, dissenting:

The Court has ordered the dismissal, at the pleading stage, of a lawsuit that presents novel and subtle issues concerning complicated financial maneuverings in the Emirate of Dubai, United Arab Emirates ("Dubai"). Dismissal is ordered because the Court has concluded that the compiaint does not allege conduct by the defendants falling within the "commercial activity" exception of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) (1988). Instead, the Court holds, the conduct alleged to have been engaged in by Dubai and by a governmental established committee is sufficiently within a judicial role to be excluded from the "commercial activity" exception. Because I am persuaded that definitive decision as to the nature of the challenged conduct cannot fairly be made from the fact of the complaint, I would uphold the District Court's order

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[4](...continued)
F.2d at 881. In the interim, however, the Emirate has conducted lengthy proceedings that resulted in determinations adverse to Drexel and Refco. We do not consider ourselves at liberty to transmute these proceedings into a § 1605(a)(2) "commercial activity," whether or not we might be wholly satisfied as to their fairness after further discovery or a full trial.

denying the motion to dismiss the complaint and let the matter proceed, at least to the summary judgment stage, if not to trial. I therefore respectfully dissent.

The lawsuit concerns the efforts of creditors, The Drexel Burnham Lambert Group Inc. ("Drexel") and Refco, Inc., to enforce rights originally arising from loan transactions with Abdul Galadari, a citizen of Dubai, and A.W. Galadari Commodities ("Commodities"), a division of A.W. Galadari Holdings (Private) Ltd. As a result of extreme financial difficulties experienced by Galadari and companies owned or controlled by him, the government of Dubai issued a series of decrees that appear to blend two types of activities that would be regarded as distinct, had they been undertaken in the course of insolvency proceedings in this country. On the one hand, the decrees created an adjudicative body, The Committee of Receivers for A.W. Galadari, *et al.* ("the Committee"), to act in a capacity similar to that of a United States bankruptcy court or a state court administering insolvency of receivership proceedings. On the other hand, the decrees also invested the Committee with authority to take over and operate Galadari's ventures, and the government of Dubai provided the Committee with substantial funds to be used for the creditors of the failed ventures. In this latter capacity, the Committee appears to have been functioning less like an adjudicator and more like either a successful purchaser of assets at a liquidation proceeding or a new corporation emerging from a Chapter 11 reorganization.

Though the capacity in which the Committee acted is in sharp dispute, the effect of at least some of its actions is quite clear, notably the Committee's decision to devote much of the fresh funds form the government of Dubai to satisfy the claims of residents of Dubai and to decline to pay the notes of Drexel an Refco. Plaintiffs allege that the chairman of the Committee refused payment of Drexel's note on the ground that the note represented "gambling losses." *See Drexel, Burnham Lambert Group Inc. v. Committee of Receivers for A.W. Galadari*, 810 F. Supp. 1375, 1386-87 n.19 (S.D.N.Y. 1993) ("Drexel").

The District Court, in its careful and comprehensive opinion upholding the sufficiency of the complaint, demonstrated a sensitive awareness of the dual nature of the Committee's activity. Judge Motley wrote:

> While the Committee has served in a quasi-judicial capacity, the Committee has also acted in commercial and non-judicial capacities. This court's jurisdiction in this matter is based upon the latter.

Drexel, 810 F. Supp. at 1391. In rejecting the District Court's ruling, this Court too recognized that there are involved in this case some activities that are essentially judicial and some that "might be regarded as commercial." ___ F.2d at ___ (opinion at 30.)

My disagreement with the Court arises because I lack the Court's ability to determine, from the face of the complaint alone, how to categorize the activities of a body created by the sovereign decree of a foreign state with whose laws and practices I have no familiarity. At an earlier stage of this litigation, we observed that "[b]ecause the Dubai decree appears to be Dubai's first attempt to frame an insolvency law, our courts have had no experience with Dubai bankruptcy practices and procedures." *Drexel Burnham Lambert Group Inc. v. Galadari*, 777 F.2d 877, 881 (2d Cir. 1985). That deficiency has not been remedied.

The Court is able to place all of the activities underlying the plaintiffs' claim on the judicial side of the line between judicial and commercial activities only by making what I regard as a somewhat imprecise generalizaTion. The Court says:

> The *gravamen* of these claims *concerns the essentially* judicial role of the committee in marshalling the assets of Galadari and Commodities and adjudicating the claims of their creditors, including Drexel and Refco, and not any of the tangentially related commercial conduct in which the Committee of the Emirate might have engaged.

___ F.2d at ___ (opinion p. 31) (emphasis added).

Upon a development of the facts, assessed against an informed understanding of the law of Dubai in the field of creditors' rights and insolvency proceedings, it would be possible to know not simply what is a the "gravamen" of the plaintiffs' claims, or what those claims "concern," or whether the Committee's role was "essentially" judicial. Instead, we would be in a position to know precisely what occurred, what the claims really are, and whether the particular actions of the committee that caused injury to the plaintiffs really were judicial. Perhaps the Committee adjudicated" the claims of Drexel and Refco and denied them, acting like a United States bankruptcy judge. But it is also possible that the Committee, acting like a successor corporation, used fresh cash from its "parent" entity to prefer some of its creditors and simply reneged on an enforceable obligation to discharge liabilities to the plaintiffs. I do not know which occurred, but I would give the plaintiffs an opportunity to develop evidence to show that their interpretation of the events is correct.

It is premature and unfair to dismiss the complaint at this time.

MANDATE

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of November, one thousand nine hundred and ninety-three.

PRESENT: HON. J. EDWARD LUMBARD,
HON. JON O. NEWMAN,*
HON. J. DANIEL MAHONEY

Circuit Judges.

THE DREXEL BURNHAM LAMBERT GROUP, INC., and REFCO, INC.,

Plaintiffs-Appellees,

-against-

THE COMMITTEE OF RECEIVERS FOR A.W. GALADARI, and THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES,

93-7078
93-7086

Defendants-Appellants,

-and-

A.W. GALADARI, and A.W. GALADARI COMMODITIES, a division of A.W. Galadari Holdings (Private) Limited,

Defendants.

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* Judge Newman became Chief Judge of the Second Circuit Court of Appeals on July 1, 1993.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the order of the district court denying the motion to dismiss the amended and supplemental complaints is reversed. The appeal from the order denying the Emirate's motion to quash discovery is dismissed as moot in accordance with the opinion of this court.

GEORGE LANGE III, Clerk
By:

/s/ Edward J. Guardaro
Edward J. Guardaro
Staff Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE DREXEL BURNHAM LAMBERT GROUP INC.,
Plaintiff,

84 Civ. 2602 (CBM)

- against -

COMMITTEE OF RECEIVERS FOR A.W. GALADARI, ET AL.; THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES; A.W. GALADARI; A.W. GALADARI COMMODITIES, a division of A.W. GALADARI HOLDINGS (PRIVATE) LIMITED,
Defendants.

OPINION

REFCO, INC.,
Plaintiff,

90 Civ. 2140 (CBM)

- against -

ABDUL WAHAB BIN EBRAHIM GALADARI, A.W. GALADARI COMMODITIES, A.W. GALADARI HOLDINGS (PRIVATE), LTD., THE COMMITTEE OF RECEIVERS FOR ABDUL WAHAB BIN EBRAHIM GALADARI, A.W. GALADARI COMMODITIES and A.W. GALADARI HOLDINGS (PRIVATE), LTD., and THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES,
Defendants.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

THE DREXEL BURNHAM LAMBERT GROUP INC.,

Plaintiff, 84 Civ. 2602(CBM)

- against -

COMMITTEE OF RECEIVERS FOR A.W. GALADARI, ET AL.; THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES; A.W. GALADARI; A.W. GALADARI COMMODITIES, a division of A.W. GALADARI HOLDINGS (PRIVATE) LIMITED,

Defendants.

REFCO, INC.

Plaintiff, 90 Civ. 2140(CMB)

- against-

ABDUL WAHAB BIN EBRAHIM GALADARI; A.W. GALADARI COMMODITIES; A.W. GALADARI HOLDINGS (PRIVATE), LTD.; THE COMMITTEE OF RECEIVERS FOR ABDUL WAHAB BIN EBRAHIM GALADARI; A.W. GALADARI COMMODITIES and A.W. GALADARI HOLDINGS (PRIVATE), LTD., and THE EMIRATE OF DUBAI, UNITED ARAB EMIRATES,

Defendants.

- -x

MEMORANDUM OPINION

I. INTRODUCTION

Defendants The Emirate of Dubai ("Dubai") and The Committee of Receivers for A.W. Galadari, et al ("the Committee") separately move to dismiss the amended and supplemental complaints of the plaintiffs The Drexel Burnham Lambert Group Inc. ("Drexel") and Refco, Inc. ("Refco"). Both motions, of Dubai and of the Committee, are denied.

Plaintiffs Drexel and Refco move jointly for security against Dubai and the Committee for costs, judgment, and potential sanction. Drexel's motion, as to costs not including attorneys fees, is granted. Security covering the judgment and possible sanctions is denied as to both Drexel and Refco.

II. BACKGROUND

Plaintiffs in these consolidated actions seek damages from the government of Dubai, a sovereign government which political subdivision of the United Arab Emirates ("U.A.E."), and the Committee, an agency or instrumentality of the government of Dubai. Plaintiffs base their claims on (a) governmental acts performed by the government of Dubai in Dubai and (b) acts of the Committee on the purported grounds that the government of Dubai was the "alter ego" of the Committee.

The activities undertaken directly by the government of Dubai were the issuance of official Decrees in 1983 and 1984 by the then Deputy Ruler and the initiation of its purchase of what ultimately proved to be approximately 80% of the outstanding shares of the Union Bank of the Middle East ("UBME") in connection therewith. The Decrees were promulgated in response to the severe financial and economic problems which had arisen in Dubai as a result of the insolvency of defendant Galadari, a resident of Dubai, and companies owned or controlled by Galadari.

In February 1983, Galadari and Galadari Commodities ("Galadari") opened a number of trading accounts with Refco, an Illinois corporation. As of November 1983, Refco alleges that Galadari owned a debt of $4,609,664.20. Drexel originally brought an action for breach of contract in connection with a promissory note ("Note"). The Note was made in favor of

Drexel Burnham Lambert International N.V. ("Drexel International") which was organized in the Netherlands Antilles and has its administrative offices in London, England. The Note, in the amount of $19,465,000.00, was executed on September 14, 1982, by defendant A.W. Galadari, both personally and on behalf of defendant A.W. Galadari Commodities, which was described as a partnership that Mr. Galadari managed. The Note was assigned to Drexel by Drexel International on October 28, 1982, the principal having been reduced by payment to $12,465,000.00, was secured by 6,068,640 shares of the UBME, a bank which Galadari controlled.

Meanwhile, in Dubai, Galadari was having severe financial problems stemming from the mismanagement of the UBME. On November 12, 1983, pursuant to a decree from the sovereign of Dubai (Decree No. 5), a Provision Board of Directors of the UBME was created to manage the UBME. *See The Drexel Burnham Lambert Group, Inc. v. Galadari*, 84 Civ. 2602, 1987 U.S. Dist. Lexis 5030 (S.D.N.Y. Jan. 10, 1987) ("*Galadari II*") at ¶ 18. Decree No. 5 provided for the vesting of the assets of Galadari and his companies in the Provisional Board, imposed a moratorium freezing all liabilities and began the liquidation of Galadari's assets.[1]

On April 17, 1984, Dubai issued Decree No. 3.[2] Decree No. 3 provided for insolvency proceedings in Dubai against Galadari and his companies by creating a Committee of

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[1] The Provisional Board was established to 1) act in place of the original board of directors in the day-to-day general management of the insolvent Union Bank, and 2) act as custodian of the non-banking business of A.W. Galadari. *Galadari II*, at ¶ 18.

[2] *See* Decree No. 3 of 1984 concerning the financial affairs of Abdul Wahab Ebrahim Galadari, Exh. 1 to Reinthaler Aff. in support of the Committee's motion to dismiss the amended and supplemental complaints of plaintiffs The Drexel Burnham Lambert Group Inc. and Refco Inc. ("Decree No. 3").

Receivers to continue the work of the Provisional Board in managing and liquidating the non-banking businesses of Galadari, empowering it to marshal and liquidate the assets of Galadari, empowering it to marshal and liquidate the assets of Galadari and his companies, to adjudicate claims against the debtor estates and to pay out valid claims from those assets. *See Galadari II*, at ¶ 26. The Committee established a set of procedures which would allow for the submission of creditor's claims.

The Committee consists of Mr. Rostamani, a member of the business community of Dubai, Mr. Abdulla Lootah who is in charge of the purchasing section of the Federal Ministry of Finance, Mr. Hassan Ibn al Sheikh, vice-chairperson of the Chamber of Commerce of Dubai and Mr. Nabil Aref, director of the marine and road section of the Federal Ministry of Public Works. *Galadari II*, at ¶ 67-71.

Since the Committee's inception it has marshalled and liquidated the assets of the estate and processed creditors claims. *Galadari II*, at ¶ 72. Since the Committee's inception over 700 claims have been submitted in the aggregate amount of $770,000,000. *See* Declaration of Nabil Aref, dated Sept. 6, 1990, Exh. 12 to Reinthaler Aff. at ¶ 6. Both Drexel and Refco have participated in the proceedings before the Committee in Dubai seeking recovery of debts owed by Galadari.

The central claims in the amended and supplemental complaint against Dubai and the Committee are that through the issuance of Decree No. 3 (and the creation of the Committee to assume control and to marshal, liquidate and distribute the assets of Mr. Galadari and his various businesses), Dubai and the Committee confiscated the security interest and claims of Drexel and Refco.

This court has rendered several prior opinions which give more detailed background as to these proceedings.[3]

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[3] *See Drexel Burnham Lambert Group, Inc. v. Galadari*, Nos. 84 Civ. 2602, 90 Civ. 2140, 1991 U.S. Dist. Lexis 4575, Apr.

(continued...)

Familiarity with these opinions is assumed for the purposes of this opinion. This matter is currently before the court on the motions of Dubai and the Committee to dismiss the amended and supplemental complaint of Drexel and Refco and on the motion of Drexel and Refco for a security against Dubai and the Committee to secure costs, judgment, and possible sanctions. These motions follow this court's June 1991 lifting of a stay that it had entered on January 29, 1987 and January 4, 1991 pending proceedings in Dubai.[4]

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[3](...continued)
8, 1991; *Drexel Burnham Lambert Group, Inc. v. Galadari*, Nos. 84 Civ. 2602, 90 Civ. 1241, 1991 U.S. Dist. Lexis 3612, March 26, 1991; *Refco v. Galadari*, 755 F. Supp. 79 (S.D.N.Y. 1991); *Drexel Burnham Lambert Group, Inc. v. Galadari*, No. 84 Civ. 2602, 1987 U.S. Dist. Lexis 5030, Jan. 29, 1987; *Drexel Burnham Lambert Group, Inc. v. Galadari*, No. 84 Civ. 2602, slip opinion, Apr. 17, 1986; *Drexel Burnham Lambert Group, Inc. v. Galadari*, 610 F. Supp. 114 (S.D.N.Y.), *aff'd in part and vacated in part* , 777 F.2d 877 (2d Cir. 1985).

[4] *See The Drexel Burnham Lambert Group, Inc. v. Galadari*, Nos. 84 Civ. 2602, 90 Civ 2140, *Order Vacating The Stays of Proceedings*, S.D.N.Y., *filed* June 28, 1991. *See also Drexel Burnham Lambert Group, Inc. v. Galadari*, Nos. 84 Civ. 2602, 90 Civ 2140, *Opinion Re Vacating the Stay: Findings of Fact And Conclusions of Law*, 1991 U.S. Dist. Lexis 3612, S.D.N.Y., March 25, 1991; *The Drexel Burnham Lambert Group, Inc. v. Galadari*, Nos. 84 Civ. 2602, 90 Civ 2140, *Supplemental Opinion Re Vacating the Stay: Supplemental Findings of Fact And Conclusions of Law*, S.D.N.Y., Apr. 8, 1991.

III. SUBJECT MATTER JURISDICTION

A. FOREIGN SOVEREIGN IMMUNITIES ACT

1. Background/History of FSIA

The Foreign Sovereign Immunities Act ("the FSIA") was passed by Congress in 1976 to codify standards for the judicial treatment of foreign sovereigns and their agencies and instrumentalities.[5] For more than a century and a half prior to the enactment of the FSIA, courts in this country had generally granted complete immunity to foreign sovereigns or deferred to the decisions of the Executive Branch. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-87, 103 S.Ct. 1962, 76 L.Ed 2d 81 (1983) (FSIA not unconstitutional in authorizing foreign plaintiff to sue foreign state in federal court on nonfederal claim).

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[5] Title 28 U.S.C. § 1330 provides:

(a) The district courts shall original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under section 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts jurisdiction under subsection (a) where service has been made under section 1608 of this title.

In 1952, the State Department adopted the Tate Letter,[6] calling for the application of a "restrictive" theory of foreign sovereign immunity. The restrictive theory of sovereign immunity allows immunity for public acts of a foreign sovereign while the commercial acts or private acts of a foreign sovereign are not immune. *Verlinden*, 461 U.S. at 487; *See also Jet Line Services, Inc. v. M/V Marsa El Hariga*, 462 F. Supp. 1165, 1169 (D.Md 1978). Because the restrictive theory was not initially codified, court decisions regarding immunity were made upon recommendations from the State Department that were often shaped by diplomatic pressures from foreign nations. As a result, the case-by-case application of the restrictive theory in matters involving foreign sovereign immunity lacked uniformity and equity. *See Verlinden*, 461 U.S. at 487-88. Congress, therefore, passed the FSIA in order to free the Government from the case-by-case diplomatic pressures of Executive Branch directed determinations, to clarify the applicable standards, and to ensure due process in matters involving foreign sovereigns. *Verlinden*, 461 U.S. at 488; *See also Jet Line Services*, 462 F. Supp. at 1170.

The FSIA codifies as federal law the restrictive theory of sovereign immunity. *Verlinden*, 461 U.S. at 488. In most instances, foreign states are immune from the jurisdiction of the United States courts. Exceptions to that general rule include cases in which the foreign state has explicitly or implicitly waived its immunity or in which the foreign state has engaged in commercial activity or when one of the other specified exceptions of the FSIA applies. *Verlinden*, 461 U.S. at 488. In such exceptional cases, the foreign state is "liable in the same manner and to the same extent as a private individual

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[6] Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dept. of State Bull. 984-985 (1952), and in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711, 96 S.Ct. 1854, 48 L.Ed 2d 301 (1976) (Appendix 2 to opinion of White, J.).

under like circumstances." *Verlinden*, 461 U.S. at 488-89 (*quoting* FSIA 28 U.S.C. § 1606).

2. FSIA Is Sole Source of Jurisdiction--Dubai Law Does Not Apply

The FSIA provides the sole basis for jurisdiction in matters involving a foreign sovereign or its agent or instrumentality. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 109 S.Ct. 683, 102 L.Ed 2d 818 (1989). In *Argentine Republic*, which involved a suit for damage done to a Liberian oil tanker that was attacked by Argentine military aircraft during the war between Great Britain and the Argentine Republic over the Falkland Islands, the Supreme court ruled that "the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic*, 488 U.S. at 434; *Republic of Argentina and Banco Central de la Republica Argentina v. Weltover, Inc.*, 504 U.S., 112 S.Ct. __, 119 L.Ed 2d 394, 403 (1992) ("The FSIA provides the 'sole basis' for obtaining jurisdiction over a foreign sovereign in the United States"). In determining that the FSIA provides the sole basis for jurisdiction, the Court ruled out the applicability of other statutes to cases involving a foreign sovereign or its instrumentality. For example, the Court ruled that neither the Alien Tort Statute[7] nor general admiralty and maritime law could be applied to determine jurisdiction in such cases. *Argentine Republic*, 488 U.S. at 439.

Defendant Committee of Receivers argues in this case that Dubai law should apply for jurisdictional purposes. The

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[7] The Alien Tort Statute provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

28 U.S.C. § 1350.

Committee asserts that Article 9 of Decree No. 3e[8] immunizes the Committee from liability in this court. Dubai law and Decree No. 3, however, do not apply here and are not relevant to this issue. In addition to the Supreme Court's decision in *Argentine Republic*, holding that the FSIA is the sole basis for jurisdiction, the Second Circuit held in *Letelier v. Republic of Chile*, 748 F.2d 790 (2d Cir. 1984) that the FSIA is "the exclusive source of subject matter jurisdiction over all suits involving foreign states or their instrumentalities." *Letelier*, 748 F.2d at 793 (involving suit against the Republic of Chile and Chilean nationals that Chilean government refused to extradite who had been indicted for the assassination of the former Chilean Ambassador to the United States and his wife) (*citing Rex v. CIA Pervana de Vapores, S.A.*, 660 F.2d 61, 62 (3d Cir. 1981), *cert. denied* 456 U.S. 926, 102 S.Ct. 1971, 72 L.Ed.2d 441 (1982)). It is therefore clear from the decisions in *Argentine Republic* and *Letelier* that Dubai law cannot be applied to the question of jurisdiction. Subject matter jurisdiction in this case is governed by the FSIA and its specific exceptions to immunity.

B. COMMITTEE AND DUBAI HAVE BURDEN OF PROVING ENTITLEMENT TO IMMUNITY

In asserting that this court lacks subject matter jurisdiction, defendants' have the burden of proving that the exceptions posed by plaintiffs do not apply. *See, e.g., Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 707-08 (9th Cir. 1992); *see also L'Europene de Banque v. La Republica de Venezuela*, 700 F. Supp. 114, 119 (S.D.N.Y. 1988) ("Under the FSIA, defendants bear the evidentiary burden of demonstrating that the exceptions are not applicable"). *Siderman* involved a suit against the Republic of Argentina and the Argentine Province of Tucuman for the torture and expropriation of property of one

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[8] Article 9 of Decree No. 3 provides:

> No liability personal or otherwise shall attach to the . . . Committee, or their advisors and agents . . . in respect of acts performed in accordance with this Decree.

of its citizens. The Ninth circuit noted that when the allegations in the complaint bring claims within an FSIA exception, the burden shifts to the foreign state of instrumentality to prove that any relevant exceptions do not apply. *Siderman*, 965 F.2d at 707-08. "'Once the plaintiff offers evidence that an FSIA exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply.'" *Siderman*, 965 F.2d at 708 (*quoting Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777 (9th Cir. 1991) (*quoting Joseph v. Office of the Consulate Gen'l of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987) *cert. denied*, 485 U.S. 905, 108 S.Ct. 1077, 99 L.Ed.2d 236 (1988))).

Plaintiffs, however, are not wholly without responsibility in resolving the issue of subject matter jurisdiction. The burden of proof is a shifting burden which ultimately falls upon the party claiming immunity.[9] Once a party has established that it is a foreign state within the meaning of the FSIA and potentially entitled to immunity, the burden shifts to the opposing party to raise the applicable exceptions to sovereign

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[9] The legislative history of the FSIA suggests a shifting burden of proof:

> [T]he burden will remain on the foreign state to produce evidence in support of its claim of immunity. Thus, evidence must be produced to establish that a foreign state or one of its subdivisions, agencies or instrumentalities is the defendant in the suit and that the plaintiff's claim relates to a public act of the foreign state -- that is, an act not within the exceptions in section 1605-1607. Once the foreign state has produced such *prima facie* evidence of immunity, the burden of going forward would shift to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity would rest with the foreign state.

H.R. Rep. No. 1487, 94 Cong., 2d Sess. 1, 17, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6616.

immunity and supporting facts. *Stena Rederi AB v. Comision de Contratos del Comite Ejecutivo General del Sindicato Revolucionari de Trabajodores Petroleros de la Republica Mexicana*, 923 F.2d 380, 390 n. 14 (5th Cir. 1991) (In suit for breach of contract and negligent misrepresentation against nationalized Mexican petroleum company and business entity, plaintiff must raise applicable exception to immunity). Upon a demonstration of the applicable exceptions, the ultimate burden shifts back to the foreign state to prove that the exceptions raised do not apply. *Stena Rederi*, 923 F.2d at 390 n. 14; *see also Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 289 n. 6 (5th Cir. 1989) (While plaintiffs had burden of production subsequent to foreign state's *prima facie* immunity, "the ultimate burden of persuasion remained at all times on [the foreign state]"); *Vencedora Oceanica Navigacion v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 199 (5th Cir. 1984) (party claiming FSIA immunity has burden of proving nonapplicability of exceptions). *See, e.g., Transamerican Steamship Corp. v. Somoai Democratic Republic*, 767 F.2d 998, 1003 (D.C. Cir. 1985) (where foreign state failed to sustain burden of proving inapplicability of exception, district court had jurisdiction); *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 253 (7th Cir. 1983) ("It is uncontested that defendants bear this burden of establishing their immunity from suit").

In this case, both defendant Committee and defendant Dubai have met their burden of demonstrating a *prima facie* entitlement to immunity by establishing that they are "foreign state[s]"[10] within the meaning of the FSIA. *See Refco, Inc.*

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[10] FSIA § 1603 states:

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(continued...)

v. Galadari, 755 F. Supp. 79, 82 (S.D.N.Y. 1991) ("This court . . . finds that the Committee is an agency or instrumentality of a foreign state"). Plaintiffs, however, have met their subsequent burden of presenting evidence indicating the applicability of an exception to immunity provided for in the FSIA.[11] The ultimate burden, therefore, now falls on the defendants to prove to the court the inapplicability of any of the FSIA exceptions.

C. DEFENDANT, COMMITTEE, IMPLICITLY WAIVED IMMUNITY

One of the FSIA exceptions to immunity that plaintiffs raise is the waiver exception. The FSIA § 1605(a) provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case --

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[10](...continued)

(b) An "agency or instrumentality of a foreign state" means any entity –

> (1) which is a separate legal person, corporate or otherwise, and
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> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

[11] Plaintiffs claim defendants have waived immunity. FSIA § 1605 (a)(1). Plaintiffs claim defendants engaged in commercial activities. FSIA § 1605 (a)(2). Plaintiffs claim defendants engaged in a taking of property in violation of international law. FSIA § 1605 (a)(3).

> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

With regard to this provision, the first issue to be resolved is the constitution of an implied waiver. Upon that determination, the issue turns to whether the acts of the Committee and Dubai comprise an implicit waiver.

Shapiro v. Republic of Bolivia, 930 F.2d 1013 (2d Cir. 1991) involved an appeal from a district court's dismissal of a suit brought against the Republic of Bolivia for non-payment of a note. In concurring in the district court's opinion with regard to waiver and holding that suit brought by a foreign state in a particular matter did not constitute waiver of immunity with respect to associated but distinct claims,[12] the Second

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[12] The result in *Shapiro*, finding no implied waiver, is distinguished from the present case on its facts. In *Shapiro*, the Republic of Bolivia issued negotiable promissory notes guaranteed by the Central Bank of Bolivia in exchange for Starfighter jets. When the State Department refused the transfer of the jets, Bolivia requested the return of the notes. Not all of the notes were returned, however, and Bolivia brought suit in the Southern District of New York to recover the notes or compensable damages from the company handling the transfer of the jets. The district court ruled in Bolivia's favor and against the company on summary judgment, but, the company filed for chapter 7 bankruptcy without returning any of the outstanding notes.

Meanwhile, Shapiro, a holder of one of the outstanding notes, filed suit in the Southern District against Bolivia, the Bolivian Air Force, and the Central Bank of Bolivia because the Central Bank had refused payment of the note that he held.

(continued...)

Circuit defined the composition of an implied waiver under the FSIA. The court observed that "Federal courts have been virtually unanimous in holding that the implied waiver provision of Section 1605(a)(1) must be construed narrowly." *Shapiro*, 930 F.2d at 1017 (citations omitted). Referring to the legislative history of the FSIA, the court noted three specific examples of actions constituting an implied waiver. The court quoted the House Report which states:

> With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract. *An implicit waiver would also include a situation where a foreign state has filed a responsive pleading in an action without raising the defense of sovereign immunity.*

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 18, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6617 (*quoted in Shapiro*, 930 F.2d at 1017) (emphasis added). The court in *Shapiro* observed that '[t]hese examples involve circumstances in which the waiver was unmistakable, and courts have been reluctant to find an implied waiver where the circumstances were not similarly unambiguous." *Shapiro*, 930 F.2d at 1017. According to *Shapiro*, then, filing a responsive pleading

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[12](...continued)

The Second Circuit held that Bolivia's suit to recover its notes from the company did not constitute waiver for the purposes of the FSIA in a separate suit brought against Bolivia by a third party concerning a separate related transaction. (The court, nevertheless went on to hold that Bolivia was not immune because it had engaged in commercial activity.)

The case here, however, involves no suit by a third party and stems from one set of transactions -- the failure of Drexel and Refco to be satisfied in the repayment of the debts owned to them by Galadari.

without raising the defense of sovereign immunity constitutes an "unambiguous" implied waiver of immunity.

In addition to the Second Circuit's decision in *Shapiro*, there is other support for finding an implied waiver where a foreign state files responsive pleadings without preserving its immunity. In considering an appeal of the district court's granting a motion to dismiss on sovereign immunity grounds, the Second Circuit in *Canadian Overseas Ores LTD v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274 (2d Cir. 1984) noted that "sovereign immunity is an 'affirmative defense which must be specially pleaded' for a court to consider it." *Canadian Overseas Ores*, 727 F.2d at 277. Where a foreign state responds without specifically pleading the sovereign immunity defense, it implicitly waives its immunity; the filing of a pleading is the point of "no return" for asserting sovereign immunity. *Canadian Overseas Ores*, 727 F.2d at 277.[13] *See also Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056, 1058 (S.D.N.Y. 1979) (quoting House Report for proposition that responsive pleading without immunity defense constitutes waiver); *Aboujdid v. Singapore Airlines, LTD*, 67 N.Y.2d 450, 494 N.E.2d 1055, 503 N.Y.S.2d 555 (Ct. App. 1986) ("An entity otherwise entitled to sovereign immunity under the FSIA which serves an answer asserting not only a number of affirmative defenses other than sovereign immunity but also a counterclaim against plaintiffs and their counsel, and in furtherance of its position utilizes a number of procedural devices before attempting some four and a half years after commencement of the litigation to amend its answer to assert the immunity defense, waives immunity. . ."); *Coporacion Venezolana de Fomento v. Vintero Sales Corp.*, 477 F. Supp. 615, 619 n. 9 (S.D.N.Y. 1979), *rev'd on other grounds*, 629

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[13] While the court in *Canadian Overseas Ores* held that the Chilean corporation had not waived its immunity by filing various *motions*, the court concluded that "the defense of sovereign community is lost if not made in the first responsive *pleadings*." *Canadian Overseas Ores*, 727 F.2d at 277 (emphasis added).

F.2d 786 (2d Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981) (where defendant did not raise sovereign immunity defense in responsive pleadings, defendant implicitly waives immunity).

Having firmly established that participation in litigation without claiming sovereign immunity constitutes waiver, the next task is to determine whether or not the Committee has waived its immunity in this case.

1. The Committee Entered As Party To Litigation

The procedural history of this case indicates that the Committee has not met its burden of proving that the FSIA waiver exception is inapplicable. The original claims of Drexel and Refco were against Galadari, a private citizen of Dubai. When Galadari experienced financial trouble that the government of Dubai felt warranted intervention, Dubai established the Provisional Board and then the Committee, which voluntarily intervened as an agent of Dubai on behalf of Galadari and Galadari's company, Commodities, in these proceedings.

Since entering this litigation, the Committee has actively participated in defending Galadari and Commodities against the claims of Drexel and Refco. Rather than making a special pleading, which the Second Circuit in *Canadian Overseas Ores* noted was necessary to preserve immunity,[14] the Committee made a general appearance in this action in 1984, as found by the Second Circuit in *Drexel Burnham Lambert Group, Inc. v. Galadari*, 777 F.2d 877, 880 (2d Cir. 1985):

> In response to Drexel's suit upon the promissory note, the Committee appeared generally and asserted twenty-five affirmative defenses.

In other words, the Committee pleaded everything that it could think of to derail Drexel's claim, but it did not plead sovereign immunity.

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[14] *Canadian Overseas Ores*, 727 F.2d at 277 ("sovereign immunity is an 'affirmative defense which must be specifically pleaded'").

Similarly, in the Refco action, the Committee appeared in 1984 and opposed Refco's motion for an order of attachment without raising the issue of sovereign immunity. (Plaintiffs' Joint Memorandum of Law in Opposition to Defendants' Motions to Dismiss the Amended and Supplemental Complaints ("Pls. Opp. Mot. Dis.") at 18). The Committee argued that Refco's motion should be denied or stayed upon comity principles. Pls. Opp. Mot. Dis. at 18. The Committee succeeded in obtaining Refco's agreements to adjourn the action based on its continuing representations to Refco that Refco's claim be considered together with Drexel's and that Refco could rely on the Committee's dealings with Drexel as if they were dealing with Refco. Pls. Opp. Mot. Dis. at 18. In fact, because of the Committee's participation in the state court proceedings brought by Refco, the New York court acted to add the Committee, *sua sponte*, as a party to the case. *See* Memorandum of Law in Support of the Committee of Receivers Motion to Dismiss ("Comm. Mot. Dis.") at 36.

Moreover, this court determined that the Committee is a party in this litigation in ruling on Drexel's application for a preliminary injunction. This court noted that neither of the named defendants, Galadari or Commodities, had appeared; rather the Committee "appeared" and answered instead. *See The Drexel Burnham Lambert Group, Inc. v. Galadari*, 84 Civ. 2602, slip opinion, April 17, 1986 ("*Galadari I*") at 1.

2. Dubai And The Committee Are The "Real Parties In Interest" As To Galadari's Assets

The Committee argues that it entered this litigation solely on behalf of Galadari and his companies and that it was not essential for the Committee to raise the immunity defense until the Committee had appeared on its own behalf, "qua Committee." This argument is unpersuasive, however, because the Committee and Dubai are the "real parties in interest" in this litigation.

The term "real party in interest" generally refers to "the one who, under the applicable substantive law, has the legal right which is sought to be enforced or is the party entitled to bring suit." *In re Comcoach Corp.*, 698 F.2d 571, 573 (2d Cir.

1983). When Dubai assumed control of the UBME, it because the real party in interest as to those assets.

In *Banco Nacional de Cuba v. Chemical Bank New York*, 658 F.2d 903, 910-11 (2d Cir. 1981), the Second Circuit held that a country that expropriated a private bank and assigned management of the bank to an agent, was the real party in interest as to the bank. Here, therefore, Dubai, which took control of the UBME and assigned its management to the Provisional Board, is the real party in interest as to Galadari's banking interest, some of which were used to secure the Drexel Note.

When the Committee assumed the responsibility of marshalling and liquidating Galadari's assets, it became the real party in interest as to those assets. Under New York law, a liquidator is the real party in interest as to the assets and interests for which he or she is responsible. *See, e.g., United States Fidelity & Guaranty Company v. Executive Ins. Co.*, 893 F.2d 517, 518 n. 1 (2d Cir. 1990) (appointed liquidator is real party in interest).

In *Fabe v. Aneco Reinsurance Underwriting Ltd.*, 784 F. Supp. 448 (S.D. Ohio 1991), a district court in another circuit confronted a similar situation. In *Fabe*, the liquidator of an oil and gas insurance company brought suit against the liquidators of the defendant reinsurance company who were appointed by the Chief Justice of the Supreme Court of Bermuda to marshal the assets of the reinsurance company and wind up its affairs. In this context, the court determined that "once [the reinsurance company] was ordered into liquidation, the real party in interest in this action became, not the corporation, but the liquidators of the corporation appointed by the Supreme Court of Bermuda." *Fabe*, 784 F. supp. at 450.

Similarly, the Committee, appointed as liquidator to marshal and wind up the affairs of Galadari and his companies, is the real party in interest as to Galadari's non-banking assets. The court in *Fabe* noted that the "liquidators are vested with all interests and property of the estate in liquidation and legal proceedings may be prosecuted or defended in the liquidator's name." *Fabe*, 784 F. Supp. at 450. The Committee, when it

appeared as liquidator of Galadari's assets, appeared as the real party in interest, "qua Committee." Because it failed to raise the defense of sovereign immunity when it appeared and responded as real party in interest, the Committee waived its immunity.

Because the Committee voluntarily intervened as the real party in interest in both federal and state proceedings and filed responsive pleading without preserving its right to sovereign immunity, the Committee has failed to meet its burden of proving that it did not implicitly waive its right to immunity. Additionally, because Dubai is the real party in interest as to Galadari's banking assets and appeared through its agent the Committee without preserving immunity, Dubai has failed to meet its burden of proving that it did not implicitly waive immunity. This court, therefore, has subject matter jurisdiction under the waiver exception of the FSIA as to both the Committee and Dubai.

D. DEFENDANTS, COMMITTEE AND DUBAI, ARE NOT IMMUNE FROM JURISDICTION BECAUSE IT ENGAGED IN COMMERCIAL ACTIVITY HAVING A DIRECT EFFECT IN THE UNITED STATES

While the applicability of only one of the FSIA exceptions is sufficient for subject matter jurisdiction, it should be noted that the commercial activity exception is also a factor in this case. Another of the FSIA exceptions to immunity that plaintiffs raise is the commercial activity exception. The FSIA § 1605(a) provides that a foreign state is not immune from suit in any case

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

FSIA § 1605(a)(2).

> "Commercial activity" is defined in the FSIA aseither a regular course of commercial conduct or a particular transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

FSIA § 1603(d).

In *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), which involved breach of contract claims brought by suppliers of Portland cement against the nation of Nigeria, the Second Circuit set some of the parameters of "commercial activity." The court determined that the words "regular course of . . . conduct" in the FSIA definition of "commercial activity" should be interpreted broadly to encompass a wide ranges of acts as the relevant activities in a given matter. *Texas Trading*, 647 F.2d at 308.[15] In *Weltover*, the Supreme Court dealt with the issu-

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[15] It should be noted, as the court noted in *Texas Trading*, that the FSIA provides almost no guidance as to the meaning and scope of "commercial." While "commercial activity" is defined as a regular course of commercial conduct or transaction, no provision of the FSIA defines "commercial." *See Texas Trading*, 647 F.2d at 308; *Weltover*, 119 L.Ed 2d at 404 (FSIA leaves "commercial" largely undefined).

In evaluating whether or not Nigeria had engaged in commercial activity in procuring cement to build that nation's infrastructure, the court in *Texas Trading* referred to three sources for standards of commercial activity with regard to Nigeria's repudiation of its contracts. The first source was statements from the legislative history concerning contracts. The second source was the case law that existed at the time the FSIA was passed which indicated that immunity could not be "claimed with respect to acts or transactions that are commercial in nature, regardless of their underlying purpose." *Texas Trading*, 647 F.2d at 309 (*citing*

(continued...)

ance of debt instruments by the Argentine government. Referring to the Supreme Court's first decision concerning the FSIA in *Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 96 S.Ct. 1854, 48 L.Ed 2d 301 (1976),[16] the *Weltover* Court concluded:

> that when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA.

Weltover, 119 L.Ed 2d at 405. Thus, if Dubai or the Committee pursued a course of conduct, transaction or act that a private player would pursue, then they engaged in commercial activity for the purpose of the FSIA exception.

In determining whether a course of conduct or a particular act or transaction is commercial activity, the court must look to

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[15](...continued)
Hearings on H.R. 3493 Before Subcommittee on Claims and governmental Regulations of the House Committee on the Judiciary, 93rd Cong., 1st Sess. 16 (1973) (testimony of Charles N. Brower, Legal Advisor, Department of State)). The third source was international law indicating that international law follows the restrictive theory which does not permit foreign states to claim immunity for their commercial acts and allows levying on commercial property for the satisfaction of judgments. *See Texas Trading*, 647 F.2d at 310, 310 n. 28.

[16] The Court in *Dunhill* held that a foreign state may not be entitled to immunity where suit was "based upon a foreign state's participation in the marketplace in the manner of a private citizen or corporation. A foreign state engaging in 'commercial' activities 'do[es] not exercise powers peculiar to sovereigns; rather, it 'exercise[s] only those powers that can also be exercised by private citizens.'" *Weltover*, 119 L.Ed 2d at 404-05 (*quoting Dunhill*, 425 U.S. at 698-705).

the nature of the activity rather than the purpose.[17] The Court in *Weltover* interpreted this statutory distinction to mean that

> the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce."

Weltover, 119 L.Ed 2d at 405 (*quoting* BLACKS LAW DICTIONARY 270 (6TH ED 1990)). The question, then, is not whether the *purpose* of Dubai's and the Committee's activities was governmental or judicial; rather the question is whether the *nature* of the activities themselves were such that they could be performed by private parties.

In applying the commercial activity exception the first task is to define the relevant conduct. *Texas Trading*, 647 F.2d at 308. *See also Braka v. Bancomer*, 589 F.Supp. 1465, 1469 (S.D.N.Y. 1984). The commercial activities in this case all involve the marshalling, liquidating and winding up of Galadari's assets. Specifically, Dubai took over and provided for the management of the UBME, a private bank. The Committee, in addition to its quasi judicial function, managed and would up Galadari's non-banking businesses and assets. Many of these activities occurred outside of the United States, and thus, fall under the third clause of the commercial activity exception.

The Court in *Weltover* ruled that analysis of the third clause of the commercial activity exception involves the following

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[17] The FSIA § 1603(d) provides:

> The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

considerations: 1) whether the lawsuit is "'based ... upon an act outside the territory of the United States'; 2) that was taken 'in connection with a commercial activity' of [the foreign state] outside this country; and 3) that 'cause[d] a direct effect in the United States.'" *Weltover*, 119 L.Ed at 403 (*quoting* FSIA 28 U.S.C. § 1605(a)(2)).

1. Commercial Activity Claims Are Based Upon Acts Outside Of The Territory Of The United States

Many of the relevant acts of Dubai and the Committee took place outside of the United States. It is undisputed that Dubai took over and provided for the management, via the Provisional Board, of Galadari's private bank in Dubai.[18] It is undisputed that Dubai provided a sum of money to be paid to the UBME's creditors, many of whom were residents of Dubai.[19] It is undisputed that the Committee marshalled, managed, and liquidated Galadari's assets in Dubai and countries other than the United States.

2. The Acts Of Dubai And The Committee Were Taken In Connection With A Commercial Activity Outside Of The United States

The relevant acts of Dubai were not only acts outside of the territory of the United States, satisfying the first aspect of the requirements of the third clause of the commercial activity exception, they were also acts taken in connection with a commercial activity outside of the United States. When Dubai took over and provided for the management of the UBME, it engaged in a commercial activity in Dubai. Dubai engaged in

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[18] Galadari had pledged 6,068,640 shares of the UBME as security for the Note held by Drexel. Pls. Opp. Mot. Dis. at 5.

[19] Drexel's Note was not repaid, however, because when Drexel sought repayment from the Provisional Board, its chairperson refused repayment claiming that Drexel's Note represented "gambling losses" and were therefore unworthy of payment. Pls. Opp. Mot. Dis. at 7.

an act that could have been conducted by a private party -- in fact, which had previously been conducted by a private party, namely Galadari. Therefore, Dubai engaged in a commercial activity in Dubai, satisfying the second aspect of the requirements of the third clause of the commercial activity exception as to Dubai.

When the Committee marshalled, managed, and liquidated Galadari's assets, it engaged in commercial activities outside of the United States. The Committee engaged in activities that could have been conducted, previously, by a private party. For example, for a time, the Committee operated Galadari's hotel in Singapore. *See* Transcript of Argument on Motion to Dismiss ("Tr.") at 38. Therefore, the Committee engaged in commercial activities outside the United States, satisfying the second aspect of the requirements of the third clause of the commercial activity exception as to the Committee.

3. The Committee's Commercial Activity Had A Direct Effect In The United States

The final requirement of the third clause of the commercial activity exception is that the act in connection with commercial activity had a direct effect in the United States. *Weltover*, 119 L.Ed 2d 407.

The Court in *Weltover* dealt specifically with the issue of what constitutes a direct effect. The Court noted that the Second Circuit in that case had rejected the suggestion in the legislative history of the FSIA that a "direct effect" must be "substantial" and "foreseeable." *Weltover*, 119 L.Ed 2d at 407. The Court affirmed the lower court's interpretation, explicitly rejecting any suggestion that the direct effect requirement of the third clause of § 1605(a)(2) "contains any unexpressed requirement of 'substantiality' or 'foreseeability.'" *Weltover*, 119 L.Ed 2d at 407. The Court concluded that "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's ... activity.'" *Weltover*, 119 L.Ed 2d at 407 (*quoting Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2d Cir. 1991). In this context, the Court had "little difficulty" concluding that the rescheduling of the maturity dates of Argentine debt instruments had a "direct effect" in the United States.

Weltover, 119 L.Ed. 2d at 408. Specifically, the Court concluded that a "direct effect" in the United States exists where money is payable in the United States is not paid due to the commercial activity of a foreign state. *Weltover*, 119 L.Ed 2d at 408.

The actions of Dubai and the Committee had a "direct effect" in the United States. As in *Weltover*, the situs of the debt in this case is in the United States, specifically, New York. The Note held by Drexel was payable in the United States and by its terms is subject to the jurisdiction of this court. Pls. Opp. Mot. Dis. at 5. The acknowledgment of debts between Refco and Galadari and Drexel and Galadari were negotiated and executed in New York. Pls. Opp. Mot. Dis. at 5.

Part of the purpose of the commercial activity exception is to create equity between companies and foreign states that become involved in commercial activity. Where a company loans money to a foreign entity and takes precautions to have disputes adjudicated in the United States, then the FSIA will not immunize a foreign state that becomes involved in that commercial transaction from a fair adjudication. When Dubai and the Committee took over the control and management of Galadari's assets and refused to pay debts owed Drexel and Refco and payable in the United States, Dubai and the Committee produced a "direct effect" in the United States.

The commercial activity exception applies in this case. As required by the third clause of the commercial activity exception, Dubai and the Committee engaged in activities outside the United States in connection with commercial activity outside the United States that had a direct effect in the United States. Therefore, Dubai and the Committee have waived their immunity according to the commercial activity exception, and this court has subject matter jurisdiction.

III. PERSONAL JURISDICTION

Personal jurisdiction under the FSIa is a matter separate and apart from the issue of subject matter jurisdiction. *See Texas Trading*, 647 F.2d at 313 (issue of personal jurisdiction is

subsequent to determination of subject matter jurisdiction). *See also Walpex Trading v. Yacimientos Petroliferos*, 712 F.Supp. 383, 390 (S.D.N.Y. 1989) ("Personal jurisdiction over foreign sovereign instrumentalities under the FSIA involves a scrutiny distinct from ... subject matter jurisdiction"). Personal jurisdiction under the FSIA is statutorily defined as well as being governed by constitutional due process requirements. *See Walpex Trading*, 712 F.Supp. at 390 (Congress did not override constitutional due process requirements in drafting the FSIA).

In terms of what the statute requires, FSIA § 1330(b) states:

> Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) [providing for subject matter jurisdiction] where service has been made under section 1608.[20]

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[20] Subsection (a) of FSIA § 1330, regarding subject matter jurisdiction, is discussed above.

FSIA § 1608, regarding service, states:

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

> (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or
>
> (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or
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> (3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail

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[20](...continued)

requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned; or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services -- and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United State; or in accordance with an applicable international convention on service of judicial documents; or

(continued...)

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[20](...continued)

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state--

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be serve, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made--

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes [its] claim or

(continued...)

FSIA § 1330(b).

Thus, according to the statute, personal jurisdiction exist where there is both subject matter jurisdiction and service. *See Shapiro*, 930 F.2d at 1020 ("Under the FSIA, ... personal jurisdiction equals subject matter jurisdiction plus valid service of process."); *Texas Trading*, 647 F.2d at 313 (statute provides for "personal jurisdiction over the foreign state as to any claim the district court has power to hear under § 1330(a), so long as service has been made under § 1608.")

As discussed above, this court has subject matter jurisdiction over both Dubai and the Committee. There is no dispute concerning the validity of service. *See* Stipulation and Order, March 17, 1992, at ¶ 2; Emirate Mem. at 74 n.38. There being both subject matter jurisdiction and valid service, the statutory requirements for personal jurisdiction are satisfied.

In addition to statutory requirements, however, the constitutional due process requirements for personal jurisdiction must also be met. *See Shapiro*, 930 F.2d at 1020 (there exist constitutional constraints on personal jurisdiction under FSIA). The Constitution requires that there be sufficient "minimum contacts" between the foreign state and the forum "such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *See Shapiro*, 930 F.2d at 1020 (*citing International Shoe Co. v. Washington*, 326 U.S.

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[20](...continued)
right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

See also Bowers v. Transportes Navieros Ecuadorianos, 719 F.Supp. 166, 169 (S.D.N.Y. 1989) (discussing service requirements for personal jurisdiction).

310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945) quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).[21]

In this case, the constitutional requirements for personal jurisdiction were satisfied when the Committee voluntarily entered and participated in this litigation, thus waiving any subsequent claim to lack of personal jurisdiction. *Grammenos v. Lemos*, 457 F.2d 1067, 1070 (2d Cir. 1972) ("If a party enters a case, makes no objection to jurisdiction, and asks the court to act on its behalf in some substantive way, it will be held to have waived further objection [to jurisdiction].") (citations omitted).

Moreover, the Committee's general appearance and participation implicates Dubai. The Second Circuit in *Texas Trading* noted that it is not only defendant's activities in the forum, but also action relevant to the transaction by an agent on defendant's behalf, which support personal jurisdiction." *Texas Trading*, 647 F.2d at 314 (*citing Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116, 120-21 (2d Cir. 1967), *cert. denied*, 390 U.S. 996, 88 S.Ct. 1198, 20 L.Ed.2d 95 (1968) (commercial activity of agent is chargeable to principle); *Frummer v. Hilton Hotels International, Inc.*, 19 N.Y.2d 533, 538, 281 N.Y.S.2d 41, 44-45. *But see Carey v. National Oil Corp.*, 592 F.2d 673 (2d Cir. 1979) (dismissing for lack of jurisdiction where minimum contacts did not exist, finding that the actions of principle do not apply to the agent).

Therefore, according to *Texas Trading*, the Committee's general appearance and contacts applies to Dubai, and Dubai can be said to have waived claims concerning lack of personal jurisdiction.

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[21] *See also Walpex Trading*, 712 F.Supp. at 390 (discussing requirements for specific and general jurisdiction and noting that "[u]nder the FSIA, contacts with the entire United States, as opposed to a particular state or forum, are relevant." *citing Verlinden*, 461 U.S. at 490). *See also Texas Trading*, 647 F.2d at 314 (regarding service under § 1608, entire United States is relevant in delineating contact).

In addition to the Committee's and Dubai's waiver of personal jurisdiction, both the Committee and Dubai have sufficient minimum contacts for due process, that is so that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Texas Trading*, 647 F.2d at 314 (*quoting International Shoe*, 326 U.S. at 316). In evaluating a defendant's minimum contacts,

> the court must examine the extent to which defendants availed themselves of the privileges of American law, the extent to which litigation in the United States would be foreseeable to them, the inconvenience to defendants of litigating in the United States, and the countervailing interest of the United States in hearing the suit.

Texas Trading, 647 F.2d at 314 (citations omitted).

Defendants in this case have sufficient minimum contacts for due process. The Committee as agent of Dubai voluntarily entered litigation in this court. Tr. at 81. The Committee requested affirmative relief, cost disbursements, and attorneys' fees. Tr. at 81. The Committee paid a judgment for costs on appeal that was entered by the Second Circuit. Tr. at 81. The Committee took discovery in this jurisdiction. Tr. at 81. And the debt at the heart of all of this litigation was negotiated and executed in the United States. In other words, defendants have had sufficient contact with the United States to satisfy due process.

Given the waiver by defendants of personal jurisdiction and given the minimum contacts of defendants, this court may constitutionally assume personal jurisdiction over both defendants.

Both the statutory and constitutional requirements being satisfied, this court has personal jurisdiction over both defendant Dubai and defendant the Committee.

IV. THE ACT OF STATE DOCTRINE DOES NOT BAR PLAINTIFFS' CLAIMS

Defendants also argue that plaintiffs' amended and supplemental complaint should be dismissed according to the Act of State Doctrine. The Act of State Doctrine states:

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

See Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 691 n. 7, 96 S.Ct. 1854, 48 L.Ed 2d 301 (1976) (*citing Underhill v. Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed 456 (1897)). The purpose of the Act of State Doctrine is to avoid the adjudication of actions that foreign states take on their own soil that might embarrass the Executive Branch or interfere with foreign policy. *See Dunhill* 48 L.Ed 2d at 313.[22]

In *Dunhill*, the Court considered the confiscation by the Cuban government of the businesses and assets of certain Cuban cigar manufacturers. The Cuban government named "interventors" [managing agents] to operate the seized businesses. When importers made payments for pre-intervention shipments to the interventors, the former owners brought suit in the United States. The Cuban interventors and the Republic of Cuba were permitted to join. The Court concluded that the Act of State Doctrine did not apply because the case involved acts which were commercial rather than public in nature. *Dunhill*, 48 L.Ed 2d at 313.

Both Dubai and the Committee were engaged in commercial activity, as determined above. Therefore, according to *Dunhill*,

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[22] Perhaps it should also be noted that the Act of State Doctrine is non-jurisdictional. *Friedar v. Government of Israel*, 614 F.Supp. 395, 399 (S.D.N.Y. 1985); *Dayton v. Czechoslovak Socialist Republic*, 672 F.Supp. 7, 11 (D.D.C. 1986). As a result, the application of the Act of State Doctrine is discretionary. *Friedar*, 614 F.Supp. at 399.

the Act of State Doctrine may not be raised to debar this court's adjudication.[23] Moreover, the Court in *Dunhill* noted that "[r]epudiation of a commercial debt cannot, consistent with this restrictive approach to sovereign immunity, be treated as an act of state." 48 L.Ed 2d at 314. The repudiation of the debts owed to Drexel and Refco in this case is therefore not an act of state.

In addition to the determination that defendants' acts were commercial, and therefore not acts of state, other details concerning defendants' transactions preclude the application of the Act of State Doctrine. The Second Circuit has determined that where the situs of the debt is in the United States, the Act of State Doctrine does not prevent creditors from recovering for their losses. *Allied Bank International v. Banco Credito Agricola de Cartoago*, 757 F.2d 516 (2d Cir. 1985), *cert. dismissed*, 87 L.Ed 2d 706 (1985).[24] The situs[25] of the

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[23] *But see Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 73 (2d Cir. 1977) (Expropriation of property of alien within boundaries of sovereign state are traditional public acts of sovereign, removed from judicial scrutiny by application of Act of State Doctrine).

In this case, however, Galadari, whose property was seized, is not an alien in Dubai. And while the nationalization of oil property in *Hunt* was accompanied by political statements suggesting reprisal against the United States as the motive and indicating that the nationalization was a public act, *Hunt*, 550 F.2d at 73, the seizure of Galadari's property was not accompanied by any such political statements. Non-public or commercial acts do not fall within the ambit of the Act of State Doctrine.

[24] *But see Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 225 (2d Cir. 1985) (where situs of debt is wholly within foreign sovereign, Act of State Doctrine may bar recovery).

debts as to both Drexel and Refco in this case is the United States. The Note held by Drexel was payable in the United States. The acknowledgment of debt between Refco and Galadari was negotiated in New York. The Act of State Doctrine, therefore, does not govern this case or intimate its dismissal.

V. THE COMMITTEE'S ACTS EXTEND BEYOND ITS JUDICIAL OR QUASI-JUDICIAL ROLE

The Commitee asserts that it is immune from suit because of its "judicial or quasi-judicial" role. While the Committee has served in a quasi-judicial capacity, the Committee has also acted in commercial and non-judicial capacities. This court's jurisdiction in this matter is based upon the latter.

As discussed above, the Committee engaged in commercial activity that was neither judicial or quasi-judicial. That commercial activity having a direct effect in the United States subjects the Committee to this court's jurisdiction under the FSIA. Moreover, when the Committee appeared before this court and filed an extensive answer to plaintiffs' complaint, it was not acting in a judicial or quasi-judicial capacity. As discussed above, the Committee's general appearance and participation constituted an implicit waiver of immunity.

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[25](...continued)

[25] The test for "situs" in the context of the Act of State Doctrine is whether the purported taking was "able to come to complete fruition within the dominion of the [Dubai] government." *Allied*, 757 F.2d at 521 (*quoting Tabacalera Severiano Jore, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 715-16 (5th Cir.), *cert. denied*, 393 U.S. 924, 89 S.Ct. 255, 21 L.Ed 2d 260 (1968).

Here, because defendants' acts involved debts payable to banks in the United States, they could not come to complete fruition within Dubai.

Defendant Committee cites authority for the proposition that members of the judiciary such as administrative law judges[26] and arbitrators[27] are immune from suit for actions they take in their judicial or quasi-judicial capacities. Defendant, however, cites no authority to support its claim that a foreign state or agent subject to the court's jurisdiction under the FSIA, that is, which has engaged in commercial activity or which has actively participated in litigation before the court, is immune from suit. Indeed, the FSIA explicitly states that where a party is subject to the court's jurisdiction under the FSIA, it is liable just as a private individual is liable.[28]

The Committee's judicial or quasi-judicial activities do not immunize it from suit, given the court's authority under the FSIA as to its commercial and non-judicial activities.

VI. PLAINTIFFS' CLAIMS ARE TIMELY

Defendants argue that plaintiffs claims are barred by the statute of limitations, asserting that plaintiffs' claims arose, if

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[26] *E.g., Butz v. Economou*, 438 U.S. 478 (1978), *on remand*, 466 F.Supp. 1351 (S.D.N.Y. 1979) (quasi-judicial function of administrative law judge entitled him to immunity).

[27] *E.g., Austern v. Chicago Bd. Options Exch. Inc.*, 898 F.2d 882, 886 (2d cir.), *cert. denied*, 111 S.Ct. 141 (1990) ("the Courts of Appeals ... have uniformly immunized arbitrators from civil liability for all acts performed in their arbitral capacity").

[28] FSIA § 1606 provides:

> As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances....

See also Verlinden, 461 U.S. at 488-89.

at all, in 1984.[29] Defendants' statute of limitations claim is unpersuasive and somewhat disingenuous. It is undisputed that plaintiffs' original claims against Galadari were timely. At that time, the Committee entered this litigation on Galadari's behalf and as an agent of Dubai. The Committee persuaded this court to stay its proceeding on comity grounds pending proceedings in Dubai. This court sustained the stay at the Committee's request for four years until this court determined that the proceedings in Dubai were unsatisfactory and undeserving of comity and lifted the stay.

Defendants cannot now argue, after delaying this case for four years in Dubai, that plaintiffs claims arising out of the same dispute is untimely. Plaintiffs' claims are not barred by any statute of limitations.

VII. PLAINTIFFS' MOTION FOR SECURITY

Plaintiffs have moved jointly to require defendants to post a bond as security for costs, attorneys' fees, any judgment that may be entered and any award of sanctions that may be levied against the Committee in this action. Drexel's motion for security for costs is granted. Refco's motion for security for costs including attorneys' fees is granted. Plaintiffs' motion for security covering judgment and sanctions is denied.

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[29] Defendants acknowledge that the FSIA sets no statute of limitations for suits against foreign states or their agents. Nevertheless, defendants contend that because foreign states are to be treated as any other private party, under § 1606, the statute of limitations that would apply to a private party should apply to Drexel and Refco in their suit against Dubai and the Committee. Defendants assert that it is an issue of first impression for the court to determine whether federal taking claims, state claims involving the expropriation of property, or conversion claims provide the best analogy. Defendants argue that plaintiffs time for suit has expired under any of the potentially applicable limitation periods.

Section 1606 of the FSIA states that a foreign state or instrumentality under the subject matter jurisdiction of the court is to be treated as any other private litigant. Under Local Rule 39 this court may require security for costs of a party to the litigation. Local Rule 39 states in pertinent part:

> The court, on motion or in [sic] its own initiatiative, may order any party to file an original bond for costs or additional security for costs in such an amount and so conditioned as it may designate.

The application of this Rule is not unprecedented.[30] Therefore plaintiffs' motion as to costs is granted.

While Rule 39 only specifies security for costs, security for attorneys' fees may be included in that award where the party seeking the security is otherwise entitled to attorneys' fees -- e.g. by statute or contract.[31]

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[30] *See Cresswell v. Prudential-Bache Securities, Inc.*, 1987 WL 4824 (S.D.N.Y. April 28, 1987) (awarding security for costs to defendant against Italian plaintiff prior to trial under Local Rule 39; "No question has been, or could be, raised with respect to the applicability of the Local Rule"); *Knight v. Yerkes and Associates, Inc.*, 675 F.Supp. 139, 142 (S.D.N.Y. 1987) (where plaintiff was resident of Thailand and collection of costs might be difficult, court granted security under Rule 39 covering depositions that would occur in various countries); *Tri-Ex Enterprises, Inc. v. Morgan Guaranty Trust Company of New York*, 1985 WL 144 (S.D.N.Y. January 11, 1985) (granting defendants' motion for costs under Local Rule 39).

[31] *See Herbstein v. Bruetman*, 141 F.R.D. 246, 247 (S.D.N.Y. 1992) ("The security for costs may include attorney's fees to which a party is potentially entitled"); *Beverly Hills Design Studio (N.Y.) Inc. v. Morris*, 126 F.R.D. 33, 36 (S.D.N.Y. 1989) ("While the language of Rule 39 limits itself to costs, attorneys' fees have been included in a cost bond where the defendant

(continued...)

Refco, in this case, is entitled to security for attorneys' fees because its contract with Galadari specifically states that Refco is entitled to attorneys' fees in the event of litigation concerning any collection action. Plaintiffs' Memorandum of Law in Support of Plaintiffs' Joint Motion for Security at 13.

Security covering potential judgment or sanctions is beyond the language and scope of Rule 39. Therefore plaintiffs' motion for security as to those awards is denied.

Drexel should submit affidavits outlining and detailing accrued and prospective costs. Refco should submit affidavits outlining and detailing same, including attorneys' fees.

VIII. CONCLUSION

For the foregoing reasons, the motions of the Emirate of Dubai and the Committee of Receivers to dismiss plaintiffs' amended and supplemental complaint is denied. Drexel's motion for security covering costs not including attorneys' fees is granted. Refco's motion for security covering costs, including attorneys' fees, is granted. Plaintiffs' motion for security covering potential judgment and sanctions is denied.

Submit Order on 15 days notice regarding costs.

Dated: January 14, 1993
New York, New York

/s/Constance Baker Motley
CONSTANCE BAKER MOTLEY
UNITED STATES DISTRICT
JUDGE

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[31](...continued)
was statutorily entitled to them"). *See also Verone v. Taconic Telephone Corp.*, 85 Civ. 8574, 1988 U.S. Dist. Lexis 1002 (S.D.N.Y. 1988) (dismissing case where plaintiff failed to post security for cost, attorneys' fees and possible sanction as ordered following an arbitration award against him).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DREXEL BURNHAM, Plaintiff(s), - against - COMMITEE OF RECEIVERS, Defendant(s).

84 Civ. 2602 (CBM)
90 Civ. 2140 (CBM)

- x

PRE-TRIAL SCHEDULE AND ORDER

All parties having appeared for a Rule 16(b) Scheduling Conference on this day (with exceptions as noted below), it is hereby ORDERED as follows:

1. Joinder of other parties and amendemnts to pleadings must be completed by _____.

2. All substantive pre-trial motions must be served and filed on or before _____.

3. All discovery shall be concluded by all parties no later than May 1, 1993.

4. Each party's pre-trial memorandum and a joint pre-trial order must be submitted by June 1, 1993.

5. The next pre-trial conference shall be held in Room 906 on April 16, 1993 at 10:00 __.M., at which time all pending motions and all pre-trial discovery matters will be heard.

6. The trial will commence on June 14, 1993, preceding which there will be final pre-trial conference at 10:00 A.M. (The lawyers who will try the case *must* attend.)

7. It is further ORDERED as follows:

1) Motion to stay or quash discovery denied.

2) Motion to stay all proceedings denied.

3) Motion for bond costs pending appeal granted as to both Committee and Dubai.

ALL PARATIES ARE INSTRUCTED TO THOROUGHLY FAMILIARIZE THEMSELVES WITH THIS COURT'S "Memorandum to All Attorneys."

Copies are available in Chambers or will be supplied upon receipt of a stamped, self-addressed envelope.

Dated: New York, New York
January 22, 1993

SO ORDERED

/s/ Constance Baker Motley
CONSTANCE BAKER MOTLEY
Chief Judge